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IN THE

Supreme Court of the United States

October Term, 1960.

No. 36.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

Brief and Appendices for Appellant.

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PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, DEFENDANT AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, SUBSTITUTED ADDITIONAL DEFENDANT,
Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

BRIEF FOR THE APPELLANT.

A.

Opinions Delivered in the Courts Below.

The majority opinion of the three-judge court, filed on December 1, 1959, is reported at 179 F. Supp. 944 (E. D. Pa. 1959), and is found in the printed Record at pp. 273 *et seq.* Senior District Judge Welsh's dissenting opinion begins at p. 286 of the printed Record.

On December 7, 1959 the three-judge court denied a timely petition for rehearing, but simultaneously filed supplemental findings of fact (Rec. 290-2).

An appeal to the Court of Appeals for the Third Circuit, solely with respect to the claim of discriminatory enforcement, was filed and was dismissed for lack of jurisdiction on December 9, 1959. An opinion thereon was filed on December 23, 1959 (Rec. 303), and is reported at 273 F. 2d 954 (3rd Cir., 1959). Appellant, simultaneously with the Jurisdictional Statement here, filed a petition for a writ of certiorari to review said dismissal. Said petition was denied on April 25, 1960. 362 U. S. 961.

An appeal to the Court of Appeals for the Third Circuit on an earlier phase of this case is reported at 266 F. 2d 427 (3rd Cir., 1959).

B.

Statement of the Grounds on Which Jurisdiction Is Invoked.

The final order from which appeal is taken is from the decision of the three-judge court entered on December 7, 1959, on which day rehearing was also denied (Rec. 297-299). The Notice of Appeal was filed December 18, 1959 in the District Court (Rec. 300). The Jurisdictional Statement was filed February 11, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1253, 1291 and 2281 *et seq.*, the appeal being from a final order of a three-judge court which refused a permanent injunction and dissolved a temporary injunction, on the ground that the state statutes attacked by appellant did not conflict with the Federal Constitution. *Query v. United States*, 316 U. S. 486, 490-91; *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 273 F. 2d 954 (3rd Cir., 1959) (Rec. 303); see also *Lee v. Roseberry*, 200 F. 2d 155, 156 (6th Cir., 1952); *cf. Radio Corp. of America*

v. United States, 341 U. S. 412. This Court noted Probable Jurisdiction on April 25, 1960. 362 U. S. 960 (Rec. 305).

C.

Statutes Involved.

The Pennsylvania statutes whose validity are involved are the basic Pennsylvania Sunday law which provides:

> "Whoever does or performs **any worldly employment** or business whatsoever on the **Lord's day, commonly called Sunday** (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.
>
> "Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, or to hinder waterman from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the **Lord's day**, commonly called Sunday, nor to the delivery of milk or the necessaries of life, **before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day.**" Act of April 22, 1794, 3 Sm. L. 177, § 1, 18 PURD. STAT. § 4699.4 (bold face type supplied),

and the Amendatory Act of August 10, 1959 which provides:

> "**Whoever** engages on **Sunday** in the business of selling, **or sells or offers for sale, on such day, at retail,**

clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding **two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.**

"Each separate sale or offer to sell shall constitute a separate offense . . ." P. L. No. 212, 18 PURD. STAT. § 4699.10 (bold face type supplied).

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, including the equal protection and due process clauses of the latter Amendment.

D.

Questions Presented.

The basic Pennsylvania Sunday Blue Law, the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, prohibits all "worldly employment" except acts of necessity on the "Lord's day (commonly called Sunday)" so that the citizens of Pennsylvania can "read the Scriptures" and attend "religious worship." *Sparhawk v. The Union Passenger Railway Co.*, 54 Pa. 401, 408-09, 423 (1867); *Commonwealth ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, 143 (1927). This Act was amended on August 10, 1959 so as to impose additional and heavier penalties on those

who sold or offered to sell at retail certain enumerated merchandise on Sunday. The court below made the following findings of fact:

(1) the Amendatory Act of August 10, 1959 was to force the cessation of work on Sunday in order to commemorate weekly the sectarian religious event and doctrine of the Resurrection of Jesus Christ, the same event and doctrine as are commemorated by the Christian Easter (Rec. 276, 290);

(2) that such practice was offensive to those persons whose religious teachings were contrary to those which gave such religious significance to Sunday, including Seventh Day Adventists, Seventh Day Baptists, Jews and atheists (Rec. 276);

(3) that work on Sunday had no effect on the health or welfare of appellant's employees or customers different from work on any other day (Rec. 290);

(4) Pennsylvania has a pattern of economic laws regulating hours of work which are separate and distinct and operate completely independently of the Sunday Laws (Rec. 292);

(5) by legislative acts and court decisions many activities substantially similar to those prohibited are exempt from the Sunday Blue Law (Rec. 290-2); and

(6) many activities substantially similar to those engaged in by the appellant have been and will be permitted by law enforcement officers in Pennsylvania even though nominally prohibited by statutes and court decisions (Rec. 284).

The record also shows that for reasons of personal profit appellee, District Attorney Paul A. McGinley, wilfully and discriminatorily enforced the law only against appellant and not against other similar businesses even

though such discrimination was called to his attention and protested. The court below refrained from making requested findings on the issue of discrimination in administration on the ground that McGinley's term of office would shortly expire, which it now has, but many prosecutions instituted by him still are pending.

The questions therefore presented are:

1. Does the Pennsylvania Act of August 10, 1959, in the light of the court findings referred to above, violate the Fourteenth Amendment to the Federal Constitution because:

(a) it is a law respecting the establishment of religion;

(b) it discriminates against certain religions and prefers one religion over other religious beliefs;

(c) it requires a symbolic religious act to be performed by all Pennsylvania citizens;

(d) there is no reasonable basis for the classification of prohibited and permitted activities contained in the Pennsylvania Act of August 10, 1959 and other Pennsylvania statutes and court decisions dealing with worldly activities in Pennsylvania on the Lord's Day;

(e) it imposes oppressive and discriminatory fines?

2. Did the wilful, arbitrary and discriminatory enforcement of the Pennsylvania Sunday Blue Law against appellant by appellee, District Attorney Paul A. McGinley, deprive appellant of rights guaranteed it by the Fourteenth Amendment to the Federal Constitution?

3. Did the court below err in refusing to pass upon the constitutionality of the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, and dismissing that part of the complaint on the

ground that a subsequent Pennsylvania court decision might make said statute inapplicable to appellant's employees, despite the fact that (a) there was a state court decision that said Act did apply to appellant's employees and (b) appellant sells and its employees have been prosecuted for selling many items not covered by the Act of August 10, 1959, but covered by the Act of April 22, 1794?

E.

Statement of the Case.

This appeal is from the final order of a three-judge court for the Eastern District of Pennsylvania which denied a permanent injunction and dissolved the Temporary Injunction, after upholding by a two to one vote the constitutionality of the Pennsylvania Sunday Blue Laws, including the Amendatory Act of August 10, 1959, P. L. 212, 18 PURD. STAT. § 4699.10.

Said court was convened pursuant to Sections 2281, *et seq.* of Title 28 U. S. C.

The court below expressly held that its decision was "contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959)," (Rec. 282), which case is now on direct appeal to this Court at Docket No. 11, October Term, 1960, Probable Jurisdiction having been noted.

Appellant herein, Two Guys from Harrison-Allentown, Inc., operates a retail store in Whitehall Township, Lehigh County, Pennsylvania, employing 300 persons. The store is along the highway outside the City of Allentown, with a parking lot for several thousand cars and caters to the workers' family shopping group out for a Sunday drive and interested in economy as against fancy and expensive center-city department store services.

Appellant opened its store in Lehigh County at a cost of over $1,000,000 only after it had been told that no one

ever had been prosecuted for selling on Sunday and being assured by the township officials that its operation was permissible (Rec. 98, 99). After appellant was open for six months the appellee, Paul A. McGinley, then the District Attorney of Lehigh County, began to arrest appellant's employees for violations of the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, the basic Pennsylvania Sunday Blue Law. These arrests and prosecutions continued every Sunday although other business activities were permitted by appellee McGinley without arrest.[1] A year later, in November, 1958, said appellee threatened to arrest appellant's employees for conspiracy, the penalty for which is a two year jail sentence and a $500 fine. 18 PURD. STAT. § 4302.

The appellant thereupon brought a bill in equity in the Federal Court for the Eastern District of Pennsylvania pursuant to 28 U. S. C. §§ 1331 and 1343, 42 U. S. C. §§ 1981 and 1983 and to 28 U. S. C. §§ 2281 and 2284. The bill in equity alleged that the Pennsylvania Sunday Law—the Act of April 22, 1794—was unconstitutional because: (a) it was a law respecting the establishment of religion; or (b) a law which prefers or places at an advantage one religion over others; (c) it denies equal protection since it was discriminatory; and (d) the appellee, Paul A. McGinley, was applying the law to appellant in a wilfully discriminatory manner. On complaint and affidavits the Court issued a temporary restraining order.

Since appellant was making an attack on the constitutionality of a state statute the matter was heard before a specially constituted three-judge court. See *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 266 F. 2d 427 (3rd Cir., 1959).

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1. The Record shows that appellee, Paul A. McGinley, discriminated against plaintiff's employees because he was improperly induced to do so by Max Hess, the President and owner of Hess' Department Store, the principal Allentown center-city department store business competitor (Rec. 135, 137-141, 155, 156-163, 198-212).

Immediately prior to the time for trial and after the filing of the Complaint, the Pennsylvania Legislature passed an amendatory act—the Act of August 10, 1959—which singled out for more severe penalty certain retail sales of particular merchandise sold by the appellant. The bill in equity was amended to include an attack on the constitutionality of this Act on the same grounds.

The court after hearing granted a preliminary injunction against enforcement of the Sunday Blue Laws against appellant after finding that "substantial and irreparable injury will be suffered by plaintiff [if the statutes are applied to it] because plaintiff will be required to discontinue the operation of its store on Sundays, the day of its largest sales volume." (Order dated September 11, 1959. (Rec. 10))

The case for a permanent injunction was tried in October, 1959. The court found that appellee, Paul A. McGinley, had threatened to enforce the Act of August 10, 1959, P. L. 212, 18 PURD. STAT. § 4699.10, against appellant's employees, that he had in the past enforced the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, against appellant's employees, that appellant had no adequate remedy at law and that appellant would "suffer irreparable harm" (Rec. 274, 292).

Certain findings made by the court below also are relevant to the merits of the question of the constitutionality of the Act of August 10, 1959.

The court below found that the origin, purpose and effect of the Pennsylvania Sunday Laws, including the Act of August 10, 1959, were to force observance of the Christian Lord's Day, and that there were many persons in Pennsylvania who were offended in their religious beliefs by the required cessation of business on Sunday since it is "an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ" (Rec. 276).

The Court also made the following additional findings of fact:

"1. Sunday is a day designated for religious services and observances of Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

"2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

"3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum. Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§ 59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§ 81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§ 121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§ 151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§ 181-185, pro-

vided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, § 1, as amended, 30 *Purd. Stat.* § 265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, § 702, as amended, 34 *Purd. Stat.* § 1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, § 406, as amended, 47 *Purd. Stat.* § 4-406 (pp. 71-72).

"4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* § 4651, 4 *Purd. Stat.* § 82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§ 152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the First Sunday and $200 thereafter, 4 *Purd. Stat.* § 4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

"5. The Commonwealth of Pennsylvania, has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 *Purd. Stat.* § 103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 *Purd. Stat.* § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 *Purd. Stat.* § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 *Purd. Stat.* § 481 (employees of motion picture theaters must be given one day of rest per week)." (Rec. 290-2)

The majority of the court, however, refused to declare the two Pennsylvania statutes under attack unconstitutional. With respect to the Act of August 10, 1959, it held that despite the clear proof of the religious origin, purpose and effect thereof, this Court's action in *Friedman v. New York*, 341 U. S. 907, wherein this Court dismissed an appeal with respect to a New York Sunday statute for "want of a substantial federal question," precluded an independent consideration of the constitutionality of such statute, since that decision had to be construed as a holding that any Sunday Blue Law even though religious in origin, purpose and effect, nevertheless does not violate the Fourteenth Amendment. With respect to the argument on the equal protection clause due to the unreasonable and discriminatory classification contained in the 1959 Act, the court, ignoring the religious aspect of the statute, held that where a statute deals with economic matters this Court permits "even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations." (Rec. 283).

The court below refrained from passing upon the claim that the appellee District Attorney, Paul A. McGinley, had wilfully and discriminatorily enforced Sunday Laws against the appellant. It conceded and found as a fact that there had been no enforcement prior to actions against the appellant. But it held that it would not make "an anticipatory finding" with respect to the future because the term of Paul A. McGinley as District Attorney would expire, according to the Court, on December 31, 1959. But it did state that on the present record even after appellee's term would end "we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities" (Rec. 285).

It disposed of the constitutional problem thus presented, however, by the novel theory that any discrimination that could be carried out by the Legislature through a statute would be equally valid if carried out by the individual law enforcement officer by applying the statute against only certain businesses regardless of the motive for the discrimination on the part of the official (Rec. 285).

On the theory that a Pennsylvania court might hold that activities covered by the Act of August 10, 1959 were now exempt from the broader provisions of the Act of 1794, it refused to pass upon the constitutionality of the Act of 1794. It did this despite the fact that less than a year before the highest Pennsylvania court had held that appellant's employees *were* covered by the Act of 1794, *Commonwealth v. Binder*, 188 Pa. Super. Ct. 42, 145 A. 2d 915 (1958), *allocatur refused*, 188 Pa. Super. Ct. xxviii, and appellee McGinley himself was still contending that he could arrest under the Act of 1794 (Rec. 275, 334), and appellant sold many items covered only by the Act of 1794.

As stated above, the court entered a final order denying the prayer for final relief and dissolving the Temporary Injunction previously in effect. On rehearing, the court,

inter alia, refused to retain jurisdiction of the part of the case dealing with the Act of 1794 pending a state court determination.

Appellant attempted to appeal to the Court of Appeals solely from the part of the court's order that dealt with the question of discriminatory enforcement by appellee, Paul A. McGinley, but the Court of Appeals held that an appeal from any action of a three-judge court would have to be to this Court, even with respect to the part of the case which could have been heard originally by a single judge. 273 F. 2d 954. A petition for certiorari from that Court of Appeals judgment was denied by this Court on April 25, 1960. 362 U. S. 961.

This Court on December 11, 1959, refused to reinstate the restraining order pending the Appeal.

After the expiration of the term of office of Paul A. McGinley, an order was entered below permitting appellant to add George J. Joseph, the new District Attorney, as an additional defendant (Rec. 305).

As stated above on April 25, 1960 this Court noted Probable Jurisdiction 362 U. S. 960 (Rec. 305).

F.

Summary of Argument.

The Court below found as a fact, based upon uncontradicted evidence, that the present Pennsylvania Blue Laws were religious in origin, present purpose and effect. This finding brings such Pennsylvania statutes specifically within the type of prohibited state action which this Court has condemned in all of its recent decisions. *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210-11. Even without such finding this Court would have to declare the Pennsylvania Blue Laws unconstitutional since the legislative history, as well as the Pennsylvania court decisions, make it clear that the present statutes are religious in origin, purpose and effect. The state enforced abstention

from work on Sunday is clearly a religious exercise in commemoration of the Resurrection, and such state enforced religious symbols are contrary to the Fourteenth Amendment. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632-33, 642.

No decision of this Court is contrary to appellant's argument. The court below did not seek to sustain the statute on any basis other than *Friedman v. New York*, 341 U. S. 907, which decision is completely inapplicable in view of the findings of the court below.

Its findings, once again, show that the statutes cannot be sustained on any day-of-rest argument for purposes unconnected with religion. *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *on appeal* at October Term, 1960, No. 11.

The Pennsylvania statutes also conflict with the requirement imposed by the Fourteenth Amendment that any classification must be based upon a reasonable ground, consistent with a constitutional purpose underlying the statute.

The Court below erred in not considering the constitutionality of the Act of 1794 since the Pennsylvania decisions had made it crystal clear that this statute would be applicable to some, if not all, of appellant's activities. In any event, even if the question of state law should be referred to a state court, the federal court should have continued the Temporary Injunction, awaiting such state determination, since it had found as a fact that the enforcement of the statute against appellant resulted in irreparable harm to appellant. *Harrison v. NAACP*, 360 U. S. 167, 178-79.

G.

Argument.

I.

The Pennsylvania Blue Laws "Establish a Religion", and Discriminate Against Certain Religions, or at Least Prefer One Religion Over Others, and Therefore Violate the Fourteenth Amendment to the Federal Constitution.

The Court here is faced with a novel situation in the Blue Law issue. This is the first case in which a court below has made explicit findings of fact[2] based upon uncontradicted evidence that particular state Sunday Blue Laws are religious in origin, present purpose and present effect and yet sustained the statute against a claim of unconstitutionality.[3]

Such findings necessarily bring the Pennsylvania statutes involved here within the class of prohibited state legislation in the field of religious matters as set forth in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210-11. There, this Court stated:

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2. These findings of fact are set forth verbatim at pp. 9-12 *supra*, and at Re. 280-1, 280, 200-2.

3. The situation here is somewhat reminiscent of *Brown v. Board of Education of Topeka*, 347 U. S. 483. There the leading precedent, *Plessy v. Ferguson*, 163 U. S. 537, had assumed that racially segregated facilities which were physically equal would not have aspects which made them inherently unequal. The lower court, presented with evidence showing the inherent inequality, made a finding of such inherent inequality. See 347 U. S. 483, 494, fns. 10, 11. The lower court, nevertheless felt constrained to follow the previous decision of this Court which had assumed that there would not be such inherent inequality. This Court, of course, when faced with a finding of fact showing the actualities of the situation, refused to follow its own antiquated precedent.

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (Boldface supplied.)

See also *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (E. D. Pa., 1959), where a three judge district court declared a bible reading statute unconstitutional once it found as a fact that

"the combination of the reading of the ten verses of the Holy Bible, followed immediately by the recitation of the Lord's Prayer, . . . gives to the morning exercises a devotional and religious aspect." p. 405.

It seems equally clear that the finding of the court below that "the required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ" (Rec. 276), brings the statutes within the prohibition set forth in *Illinois ex rel. McCollum v. Board of Education, supra*, and *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Compulsory abstention from work on Sunday is a compulsory form of religious observance, like kneeling, covering or uncovering the head and other ceremonies or symbols

"There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632-33, 642.

The findings of fact made by the court below are supported by the uncontradicted and unimpeached testimony of the Jewish and Seventh Day Adventist expert witnesses. This testimony shows that the Sunday Laws are religious in origin and in present purpose and effect, and that they commemorate the Resurrection of Jesus Christ, and oblige everyone to honor a basic doctrine of the major Christian denominations by abstaining from work, which has been a traditional manifestation of religious respect among Jews for 3500 years [4] and among Christians for at least 1600 years.

Appellant has set forth, in Appendix A of this Brief, pages 1a-11a, *infra*, a summary of the testimony of the expert witnesses. In Appendix C, pages 31a-40a, *infra*, are set forth the views of the Seventh Day Adventists, prepared by their General Conference. In Appendix B, pages 12a-30a, *infra*, are references to the writings of informed Christian religious and lay scholars which recognize that Sunday is the weekly religious commemoration of the Resurrection, and that a state law which forces the compulsory abstention from work on Sunday legislatively compels observance of, and honor to, this pivotal Christian religious tenet

4. See Appellants' Brief in *Braunfield, et al. v. Gibbons, et al.*, Oct. Term, 1960, No. 67, at pages 10-13 for short summary of the high place of the Jewish Sabbath, Saturday, in traditional Judaism and the Biblical prohibition against all work on that day, even by servants, animals and strangers. On the holiest day of the Jewish year, Yom Kippur, the Day of Atonement it is commanded:

> "And ye shall do no work in that same day: for it *is* a day of atonement, to make an atonement for you before the Lord your God.
>
> "And whatsoever soul *it be* that doeth any work in that same day, the same soul will I destroy from among his people.
>
> "Ye shall do no manner of work: *it shall* be a statute for ever throughout your generations in all your dwellings.
>
> "It *shall be* unto you a sabbath of rest, and ye shall afflict your souls: in the ninth day of the month at even from even unto even, shall ye celebrate your sabbath."

LEVITICUS XXIII, 28, 30, 31, 32. See also NUMBERS, XXIX, 7. A similar admonition applied also on other holy days, as appears from these two books of the Bible, and elsewhere therein.

Overwhelming support for the findings of fact is found in the very language of the laws in question and in the various opinions of the Pennsylvania courts which have dealt with these laws, put into evidence at the trial (Rec. 46-48, 212).

The original Pennsylvania Sunday Laws were first enacted in Pennsylvania on December 7, 1682, the first year of the settlement here:[5]

> "Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freeman of the Province of Pennsylvania and territories thereunto belonging, **to make and establish such Laws as shall best preserve true Christian** and civil Liberty, **in opposition to all Unchristian**, Licentious and unjust practices, **(Whereby God may have his due**, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.
>
> "Be It Therefore Enacted By William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same, That these following Chapters and Paragraphs shall be the Laws of Pennsylvania and the territories thereof. Chap. 1. Almighty God, being Only Lord of Conscience father of

5. "The idea which informs this law is that Pennsylvania was to be a Christian state on a Quaker Model. Only one condition is made necessary for office or citizenship, *viz.*—Christianity." 18 Encyclopaedia Britannica (20th *Century Edition.*) p. 506 (1905) (*Article on William Penn*).

Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship; who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind . . . .

"BE IT ENACTED BY THE AUTHORITY AFORESAID That . . . to the end That Looseness, **irreligion,** and **Atheism** may not Creep in under pretense of Conscience in this Province, BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, THAT, **according to the example of the primitive Christians,** and for the ease of the Creation, **Every first day of the week, called the Lord's day,** People shall **abstain** from their usual and common **toil** and **labour,** That whether Masters, Parents, Children, or Servants; they may the better dispose of themselves **to read the Scriptures** of truth at home, or **frequent** such meetings **of religious worship abroad,** as may best sute their respective persuasions." (Duke of York's Book of Laws, 1676-1682, pp. 107-108) (Bold face supplied.)

The Act of 1682 was reenacted on November 27, 1700 and on January 12, 1705, in the same form. *Commonwealth v. Hoover*, 25 Pa. Super. Ct. 133, 139 (1904). Then the present law, the Act of 1794, **"was enacted as a direct result of the yellow fever plague of 1793 which ran rampant in Philadelphia. The plague was regarded as a 'scourge upon a wicked people.' The Pennsylvania legislature hastened to legislate away the wickedness of the people by shackling the devil in his most prosperous day."** *Commonwealth v. Pedano*, 33 D. & C. 551, 552-553 (1938). Ministerial groups had implored the Legislature to enact such legislation. (Ex. P-1, Rec. 47). See PENNSYLVANIA SENATE JOURNAL (1793-1794), pp. 15-17, 42. The Act refers to Sunday as "the Lord's Day". The same Act also prohibited blasphemy, specifically defining blasphemy as in-

cluding improper references to "Jesus Christ."[6] The Act of 1794 was carried over to the Criminal Codification Act of 1939 without change. 18 PURD. STAT. § 4699.4. And, in recognition of the religious aspect of the basic Sunday statute, subsequent statutes exempting certain activities from the general prohibition usually provide that such exempt activities are permitted only after the morning church services (that is, beginning at 1 or 2 P. M.), and must be completed prior to evening vesper services (that is, before 6 or 7 P. M.). See, *supra*, pp. 10-11.

The Legislature in 1794 had justification for protecting the Christian Sabbath; the Pennsylvania Constitution at that time (Constitution of 1776) provided that each legislator had to take the oath that, "I do acknowledge the Scriptures of the old and new Testament to be given by divine inspiration." See SCHAPPES, DOCUMENTARY HISTORY OF THE JEWS IN THE UNITED STATES, p. 64 (1950). And the generally accepted notion then was that "Christianity, general Christianity is, and always has been, part of the common law of Pennsylvania." *Updegraph v. Commonwealth*, 11 Sergeant & Rawle, 394, 400 (1824). See also decision of Justice Story in *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, 198 to the effect that the "Christian religion is part of the common law of Pennsylvania."[7] And thus, the Legislature purposely intended that "Jews . . . are bound to observe the civil regulations made for the observance of the Christian Sabbath." *Society v. Commonwealth*, 58 Pa. 125, 135 (1866).

The Supreme Court of Pennsylvania has uniformly and repeatedly, from 1853 to date, acknowledged that the Sunday Blue Laws were based upon the fact that Sunday is a day which occupies a special position in the Christian

6. Statutes on blasphemy had been used in the persecution of Jews. See, *e.g.*, *Indictment of Dr. Jacob Lumbroza in Maryland*, February 23, 1658, *Records of the Provincial Court (Maryland)* Lib. S. 1658-1662, *Judgments*, pp. 154-164.

7. As late as 1892 Justice Brewer in *Holy Trinity v. United States*, 143 U. S. 457, stated, "This is a Christian Nation."

religion. In *Sparhawk v. The Union Passenger Railway Co.*, 54 Pa. 401 (1867), the Court said:

"All these questions, and a multitude of others of similar character, must be answered in the affirmative; if running railway cars on Sunday on city passenger railways is a work of necessity within the meaning of the exception in the Act of 1794. It may be doubted whether keeping theatres and places of public amusement open on Sundays might not be justified by the same line of argument. Many might be found, doubtless, who would affirm on oath that theatrical representations are conducive to mental and bodily health, and that such recreation as they afford is a necessity. Such a construction of the statute would make it but an empty sound. It would be losing sight entirely of the objects sought to be secured, the observance of a day of rest for the community, thereby **enabling every one to worship God according to the dictates of his conscience**, without distraction, and without disturbance, and thus giving a check to vice and immorality."

* * *

"Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere worldly employment, are exactly what the statute was passed to protect: 10 Casey 398." (pp. 408-409, 423)

In *Commonwealth v. Nesbit*, 34 Pa. 398 (1859) the Court said:

"Let us inquire why people are forbidden to carry on their worldly business on the Sabbath? Our brother Woodward has already shown, that it is in order that people may devote the day to rest, and to the worship of God."

* * *

"How, then, is it possible for a Christian people to avoid protecting such a day and its institutions?

If there are men who oppose them as superstitions, let them at least respect them as essential constituents of the people's life, which cannot possibly be laid aside at will. If strangers to our institutions dislike these particular ones, let them accord a reasonable respect to us, and indulgence to our customs, and they will soon be reconciled to both, and find other matters more needing their reforming efforts."

* * * *

"On the other hand, **a special purpose of the day is, that people may enjoy religious worship and instruction**, and hence, the functions of the preacher, the religious teacher, the sexton, the organist, and the singers, are not forbidden, even though these persons engage in these employments as a means of livelihood. Hence, also, the ordinary means of attending public worship are not forbidden, when used purely for this purpose. In this view of the case, it is the rightness and the exigencies of the purpose that justify the ordinary means of effectuating it. Conducting and attending religious worship are among the very purposes for which the law protects the day, and therefore all the means which common usage shows to be reasonably necessary for these purposes, are not forbidden. . . ." (pp. 405, 406-407, 407-408)

In *Commonwealth ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, 143 (1927), the **last** time the Commonwealth's highest court spoke on the subject, the Act of 1794 was upheld on the ground that "**Christianity is part of the common law of Pennsylvania**[8]. . . **Sunday is the holy day among Christians.**"

8. Thomas Jefferson's study of the origin of this doctrine led him to the conclusion it was premised upon error:

"We have a curious instance of one of these pious frauds in the laws of Alfred. He composed, you know, from the laws of the Heptarchy, a digest for the government of the United Kingdom, and in his preface to this work he tells us expressly the sources from which he drew it, to wit, the laws of Ina, of Offa, and

The Attorney General of Pennsylvania in his brief filed in the baseball case admitted, indeed earnestly urged, that the Sunday Laws had religious significance:

Aethelbert (not naming the Pentateuch). But his pious interpolator, very awkwardly, *premises* to his work four chapters of Exodus (from the 20th to the 23rd) as a part of the laws of the land; so that Alfred's *preface* is made to stand in the body of the work. Our judges too have lent a ready hand to further these frauds, and have been willing to lay the yoke of their own opinions on the necks of others: to extend the coercions of municipal law to the dogmas of their religion, by declaring that these make a part of the law of the land. In the Year-Book 34, H. 6, p. 38, in Quare impedit, where the question was how far the common law takes notice of the ecclesiastical law, Prisot, Chief Justice, in the course of his argument, says, 'a tiels leis que ils de seint eglise ont, en *ancien scripture*, covient a nous a donner credence; car ces common luy sur quels touts manners leis sont fondes; et auxy, sir, nous sumus obliges de canustre lour esy de saint eglise,' etc. Finch begins the business of falsification by mistranslating and misstating the words of Prisot thus: 'to such laws of the church as have warrant in *holy scriptures* our law giveth credence.' Citing the above case and the words of Prisot in the margin, Finch's law, B. 1, c. 3, here then we find *ancien scripture*, ancient writing, translated 'holy scripture'. This, Wingate, in 1658, erects into a maxim of law in the very words of Finch, but citing Prisot and not Finch. And Sheppard, tit. Religion, in 1675 laying it down in the same words of Finch, quotes the Year-Book, Finch and Wingate. Then comes Sir Matthew Hale, in the case of the King v. Taylor, 1 Ventr. 293, 3 Keb. 607, and declares that 'Christianity is part and parcel of the laws of England.' Citing nobody, and resting it, with his judgment against the witches, on his own authority, which indeed was sound and good in all cases into which no superstition or bigotry could enter. Thus strengthened, the court in 1728, in the King v. Wollston, would not suffer it to be questioned whether to write against Christianity was punishable at common law, saying it had been so settled by Hale in Taylor's case, 2 Stra. 834. Wood, therefore, 409, without scruple, lays down as a principle, that all blaspheming and profaneness are offenses at the common law, and cites Strange. Blackstone, in 1763, repeats, in the words of Sir Matthew Hale, that 'Christianity is part of the laws of England', citing Ventris and Strange, *ubi supra*. And Lord Mansfield, in the case of the Chamberlain of London v. Evans, in 1767, qualifying somewhat the position, says that 'the essential principles of revealed religion are part of the common law.' Thus we find this string of authorities all hanging by one another on a single hook, a mistranslation by Finch of the words of

"Let us consider the Act of 1794, its purpose and express provisions as our Courts have interpreted and

Prisot, or on nothing. For all quote Prisot, or one another, or nobody. Thus Finch misquotes Prisot; Wingate also, but using Finch's words; Sheppard quotes Prisot, Finch and Wingate; Hale cites nobody; the court in Woolston's case cite Hale; Wood cites Woolston's case Blackstone that and Hale, and Lord Mansfield volunteers his own *ipse dixit*. And who now can question but that the whole Bible and Testament are a part of the common law? And that Connecticut, in her blue laws, laying it down as a principle that the laws of God should be the laws of their land, except where their own contradicted them, did anything more than express, with a salvo, what the English judges had less cautiously declared without any restriction?" (Letter, Jefferson to Adams, Jan. 24, 1814, COUSINS, IN GOD WE TRUST, pp. 257-9 (1958)).

In 1873, the Ohio Supreme Court, in *Minor v. Board of Education of Cincinnati*, 23 Ohio St. Rep. 245-247 wrote:

"We are told that this word 'religion' must mean 'Christian religion', because 'Christianity is a part of the common law of this country', lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a *law* of the state, like every other law, it must have a *sanction*. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do *not* attempt to *enforce* Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they *are* the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion 'without partiality', and *therefore* a religion 'without hypocrisy'. True Christianity asks no aid from the sword of civil authority. It began without the sword and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. Armed with these, and these alone, it is not afraid nor 'ashamed' to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or 'ashamed' is, that it is not the 'power of *man*', but 'the power of God', on which it depends. True Christianity never

construed them. **No opinion of this Court, however has failed to state and sustain its high and holy purposes in safeguarding the Christian Sabbath.**" Brief of Thomas J. Baldrige, Attorney-General of the Commonwealth of Pennsylvania (p. 22; see also pp. 25, 27, Ex. P-2, Rec. 47). (Bold face supplied.)

The Pennsylvania Supreme Court has also stated that religious doctrines form the basis for interpreting the Act: The Act prohibited "**the worldly employments . . . for the sake of the religious ones.**" *Commonwealth v. Nesbit*, 34 Pa. 398, 409 (1859). Other expressions by the courts of Pennsylvania which base and support these laws on religious grounds are cited in Plaintiff's Exhibits 2 through 8 (Rec. 47-48). In fact there is not one single court decision of the Commonwealth's highest court from 1853[9] to date

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shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that can not live under equal and impartial laws ought to die, and sooner or later must die."

In short, the Biblical admonition: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." (St. Matt. XXII, 21)

9. There is reference to the day-of-rest idea in the earlier decision in 1848 in *Specht v. Commonwealth*, 8 Pa. 312 (1848). But even there the Court held that the purpose and motive of the Legislature in enacting the Act of 1794 was "to prohibit the profanation of a day regarded by them as *sacred*." (at p. 323). And Judge Coulter concurred at p. 327 on the ground that: "It guarded the Christian Sabbath from profanation, and, in the language of the act, prohibited work or worldly employment on the LORD'S DAY, commonly called SUNDAY; and not because of the mere usefulness of the day as a day of rest and cessation from worldly labour."

Moreover, in the earlier case of *Commonwealth v. Wolf*, 3 Sergeant & Rawle 48 (1817) the Court upheld the Act of 1794 on the ground that: "Laws cannot be administered in any civilised government unless the people are taught to reverse the sanctity of an oath, and look to a future state of rewards and punishments for the deeds of this life. It is of the utmost moment, therefore, that they should be **reminded of their religious duties** at stated periods." (p. 51)

which places the Sunday Laws on any basis other than the support of Christianity by honoring its holy day, the Lord's Day, and encouraging Christian religious worship.

Based upon this evidence, the findings of fact of the court below clearly are not erroneous. Indeed, they are the only findings which reasonably could be made. Two judges in courts of original jurisdiction in Philadelphia County have recently reached the same conclusion and declared the very Pennsylvania Sunday Law now before this Court to be unconstitutional. These opinions are printed in Appendices D and E hereof, pages 41a *et seq.* and 59a *et seq.*

Equally significant is the statement of the three-judge court in the Third Circuit in *Bargaintown, U. S. A., Inc. v. Whitman*, U. S. D. C. M. D. Pa., Civil Action No. 6760, now on appeal to this Court at Docket No. 76, October Term, 1960, a court which included Circuit Judge Hastie, also a majority member of the court below: "If the question involved in this case came to us as one of first impression, we would find great difficulty in upholding the constitutionality of the legislation in question." A three-judge court in *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *now on appeal to this Court*, at October Term, 1960, No. 11, reached the same findings by an examination of the Massachusetts law and Massachusetts decisions thereon, and held that a similar Massachusetts statute was unconstitutional.

On this record, the constitutionality of the Pennsylvania Sunday Blue Laws cannot be sustained, at least not in the absence of a compelling showing of great public necessity for their existence. *Thomas v. Collins*, 323 U. S. 516. This Court repeatedly has held that where freedom of speech or religion is affected, only in the case of compelling public necessity may a state be permitted to enact such laws. *Thomas v. Collins*, 323 U. S. 516, 530; see also *West Virginia Board of Education v. Barnette*, 319 U. S. 624; *Marsh v. Alabama*, 326 U. S. 501.

There was no evidence of such public necessity at the trial and the court below found none. In fact, it made it clear that it was upholding the constitutionality of the Pennsylvania Sunday Laws only because it felt constrained to do so by this Court's one sentence per curiam order in *Friedman v. New York*, 341 U. S. 907 (Rec. 282). And, as stated above, the Circuit Judge of the panel indicated elsewhere that but for this precedent, he would have had great difficulty in sustaining the statute. But that one line order does not bar this Court from making a present independent judgment regarding the constitutionality of the Pennsylvania Sunday legislation. This Court now has before it a finding of fact which completely destroys the assumption *Friedman* was based upon. Likewise *Soon Hing v. Crowley*, 113 U. S. 703, *Hennington v. Georgia*, 163 U. S. 299, and *Petit v. Minnesota*, 177 U. S. 164,[10] cited in *Friedman* by the state court, are irrelevant in the present case. All of these cases were decided prior to *Murdock v. Pennsylvania*, 319 U. S. 105, which was the first time that this Court protected First Amendment rights from state action through the Fourteenth Amendment.[11]

10. The actual issue in the *Soon Hing* case was whether an ordinance prohibiting washing or ironing clothes in public laundries between the hours of 10:00 P. M. and 6:00 A. M. or on Sunday was void on the ground that it constituted a discriminatory classification and was beyond the police power of the state under the Fourteenth Amendment. In *Hennington*, the issue was whether a state statute prohibited regulation of interstate commerce. In *Petit*, a law prohibiting the operation of barber shops on Sunday was challenged as an arbitrary classification under the Fourteenth Amendment.

11. The opinion in the *Murdock* case reversed the Superior Court of Pennsylvania, 149 Pa. Super. Ct. 175 (1942). Allocatur had been denied by the Supreme Court of Pennsylvania. The *Murdock* decision, which was a departure from earlier opinions of this Court, *cf. Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 543, has been followed by this Court in many decisions without exception. Several lower courts have already re-examined the Blue Law issue and have determined that such laws conflict with the Fourteenth Amendment because of the religious nature of such laws. *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *on appeal* here, October Term, 1960, Docket No. 11. Two Philadelphia *nisi prius* courts, one in equity and one in a criminal

Appellees here may attempt to justify the Sunday Blue Laws on the specious contention that these laws are civil, not religious, legislation, and that their purpose is to provide a day of rest for the weary laborer. This argument has already been dismissed as unsound by Judges Magruder and Woodbury in *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher, supra*, 176 F. Supp. at pages 473-4, *now on appeal* at October Term, 1960, No. 11. Moreover, it is submitted that the findings of fact made by the court below foreclose this argument to the appellees.

Pennsylvania, as the court below found, has a well-developed pattern of rational rest laws, wholly distinct from the Blue Laws, which do not impinge upon the rights of conscience, but yet assure a day or more of rest a week.[12] Here there is a crazy quilt of exceptions to the Sunday Laws which indicates no real legislative interest in a day of rest for health's sake[13] as contrasted with a ceremonial day of religious honor. Appellees here have admitted that the health or welfare neither of appellant's employees nor of its customers is adversely affected by Sunday sales.[14] And,

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proceeding, have held the 1959 Pennsylvania Amendment unconstitutional: *Commonwealth v. Cavalerro and Levenson*, Court of Quarter Sessions, Misc. Div. (Alexander, J.), filed April 20, 1960, Phila. Legal Intelligencer, April 22, 1960; *Bargain City, U. S. A., Inc. v. Richardson Dilworth, Mayor of the City of Philadelphia, et al.*, Common Pleas Ct., Dec. Term, 1959, No. 1411, filed June 10, 1960 (Doty, J.), Phila. Legal Intelligencer, June 22, 1960. The findings of fact as to the religious nature of the law in both cases are in accord with those of the three-judge court here. The opinions are printed as Appendices D and E to this Brief.

12. See Findings of Fact Nos. 2, 3, and 5 (Rec. 290-2).

13. Finding of Fact No. 5 (Rec. 292).

14. Finding of Fact No. 2 (Rec. 292). On Rec. 36 the testimony is as follows:

"Q. You make no claim that anybody who is a clerk at Two Guys, from Harrison was being injured in either his health or his welfare by working on Sunday?

A. No.

Q. And likewise that people who made purchases there were not being adversely affected in their health and welfare by purchasing on Sunday?

A. No."

here too, is presented the situation where a person can, under the Blue Laws, work in a covered job for six days and in an exempt activity, such as baseball or transportation, for the seventh day, thus not achieving any day-of-rest objective. The only way to achieve the avowed purpose would be to provide that in every week each person must take at least one day of rest regardless of what business the person is employed in. And many states have adopted such one-day-in-seven rest laws. See *Sunday Laws*, 25 S. Calif. L. Rev. 131; 434 (1952). Judge Alexander has correctly pointed out that such laws generally can be and are enforced, as are the regular hour laws, fn. 13, *supra*, whereas the sporadic or discriminatory enforcement of the Sunday Laws is common knowledge. Appendix D, p. 46a, fn. 6; *cf. Martin v. Struthers*, 319 U. S. 141.

Appellees are also foreclosed from making the day-of-rest argument, for in Pennsylvania, as generally elsewhere, judicial justification of the Blue Laws had been precisely their religious nature, to preserve and defend this Christian nation.[15] Indeed, with such decisions as *Lochner v. New York*, 198 U. S. 45, then holding hour laws unconstitutional as an interference with freedom to contract, it was doubtful whether the Blue Laws could have been sustained as civil rest laws. It was only in recent years when the religious nature of the Blue Laws became constitutionally suspect that their faithful adherents took to supporting them as secular civil rest laws.

The history of the origin and development of the Blue Laws to this day, as the expert witnesses testified and the court below found, show indisputably that they are religious. And they are none the less religious even though vested economic interests—the center-city department stores—now rally to their defense in order to freeze a merchandising pattern into which a large segment of the working people of our country, as consumers and shoppers, do not want to be frozen. Many people want to shop in

15. See pp. 20-28, *supra*.

family groups, where they can park the family automobile, out of the high rent district, at the lowest possible price, without frills and fancy fashion "salons." Appellant wants to meet that demand.

"The manipulation of this religious sentiment by certain commercial groups, whose economic interests happen to coincide therewith, does not destroy the religious nature of the law" (Appendix D, p. 56a, fn. 21).

We are not met here with bona fide and essential civil laws, motivated rationally and substantially by the intent to preserve, in this world, the health and welfare of our citizenry, as we have in such laws as the compulsory vaccination, child labor and polygamy laws.[16] The court below found as a fact: "Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employes or customers of the store than does work on any other day" (Rec. 290). The two Philadelphia courts have made the same finding (Appendix D, p. 46a, fn. 6, Appendix E, p. 61a).

No clear or pressing civil danger faces the Commonwealth from which it can be saved only by invading the deep religious sensibilities of substantial numbers of its citizens.[17] Quite the contrary, the record here is clear that the Blue Laws had not been enforced at all in Lehigh County, Pennsylvania, from at least 1951 until appellant's

16. *See Jacobsen v. Massachusetts*, 197 U. S. 11; *Prince v. Massachusetts*, 321 U. S. 158; *Cleveland v. United States*, 329 U. S. 14.

17. The view of Jews toward compulsory observance by them of the Christian Sabbath or Sunday is set forth in the testimony of the expert witness, Dr. Hoenig, and the notes thereto, Appendix A, pp. 1a-9a.

The views of the Seventh Day Adventists appear from the testimony of the expert witness, Elder Odom, Appendix A, pp. 9a-11a, and from the memorandum which the General Conference of Seventh Day Adventists requested Appellant to submit with its brief to the court below, reproduced here as Appendix C to this brief, pp. 31a-40a.

In 1956 there were 252,544 Seventh Day Adventists and 6,435 Seventh Day Baptists in the United States, of which 7,248 and 146 respectively resided in Pennsylvania. STUDY BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES.

store opened in 1957, despite flagrant violations, and since 1951 it has been enforced against few people other than appellant (Rec. 218, 284-5, 98).

Appellees concede that there had been for many years a complete, deliberate and intentional lack of enforcement of the Sunday Laws in Lehigh County (Ex. P-9, Rec. 217-218). Lack of enforcement throughout Pennsylvania is notorious [18] and has long been recognized by the Pennsylvania Legislature:

> "The Pennsylvania Sunday Blue Law of 1794 is violated every Sunday by most people in our State. . . .
>
> "Who does not ride in his automobile on Sunday for pleasure? Who does not purchase candy, ice cream and cigars from candy shops on Sunday? Who does not ride in trolley cars, trains and buses on Sunday? Who does not purchase gasoline and oil on Sunday? Who does not use electric and gas on Sunday? And who does not use the telephone on Sunday? . . .
>
> "For years anyone with money enough to be a member of a club could play golf or tennis on Sunday morning or afternoon, with caddies working on Sunday during church service, and in the evening could attend a moving picture or theatrical show. . . ." Vol. 18, PA. LEGISLATIVE JOURNAL, Part IV, 1935, pp. 4644, 4645.

The defendant stipulated that for at least six years prior to the opening of plaintiff's store in late 1957, there was no enforcement of the Blue Law in Lehigh County, despite the regular Sunday operation of cement, automobile, steel and other manufacturing plants, public and

(CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES, ENUMERATION AND ANALYSIS BY COUNTY, STATE AND REGION) (1956).

In 1958 there were 5,261,550 Jews in the United States, constituting 3.04 per cent of the population. There were 442,200 Jews in Pennsylvania, 4.03 per cent of the population. AMERICAN JEWISH YEAR BOOK, p. 18 (1959), Vol. 60.

18. Rec. 222, 218, 115-116; Appendix E, *infra*, p. 67a.

private amusement parks, golf courses, both municipal and private, swimming pools, newspapers, radio and television stations, bowling alleys, and florists (Ex. P-9, Rec. 218, 222). There were over 100 retail establishments in Whitehall Township alone which were open on Sunday prior to the time defendant proceeded against plaintiff (Rec. 218, 150-1).

Establishments which have operated for years on Sunday, without any substantial interference from the District Attorney, include: the Bargain Center, an establishment similar in nature to the Appellant's store; Kleckner's TV and Appliance Store; drug stores with jewelry departments larger than that of plaintiff and with toy, clothing and camera departments; Nestor's Sporting Goods Store, advertised as the world's largest sporting goods store and selling, in addition, toys and clothing; the Bethlehem Steel Co.; Mack Truck Co.; Cement Mills; newspapers, television and radio stations; Fullerton Furniture Galleries; the "Home Show", a vast business promotional marketing show conducted on March 2, 1958, with a display and sale of products by some sixty business firms; a food market in the west end of Allentown with 50% of its floor space devoted to non-food items; greenhouses; bowling alleys; golf driving ranges; the local amusement park; the Allentown Municipal Golf Course; and a whole host of small stores which sell the same kind of items as are sold in plaintiff's store (Ex. P-9, Rec. 94, 108, 109, 110, 115-6, 133-4, 148, 163-166, 170, 172, 173). Three smoke shops were open, and a Dolly Madison Shop that sells dolls, gifts, ice cream and candy, and the Planters Peanut Shop (Rec. 104).

In addition to refusing to arrest those operating many of the above establishments, the District Attorney stated publicly on various occasions that he would not enforce the Blue Law against a number of activities clearly within its prohibition, including bowling alleys, the sale of Christmas trees, the operation of greenhouses and florist shops (Rec. 171-172, 150, 221-2).

II.

The Pennsylvania Sunday Laws, on Their Face, and as Enforced by Appellee McGinley, Are Unconstitutionally Discriminatory Since There Is No Rational Basis for the Distinction Between Legal and Illegal Activities Under Such Laws.

The court below made findings of fact which show the general discriminatory nature of the Pennsylvania Blue Laws (Rec. 290-92). The 1959 amendment to the Blue Laws, which is set forth verbatim at pages 3-4, *supra*, singles out only certain items, and prohibits only the retail sales of these items. The court below implied that the classification was "near whimsical" [19] (Rec. 283). The two Pennsylvania courts which have had occasion to interpret the statute have graphically noted the utter irrationality of the classifications contained therein, and the absence of any possible reasonable basis.

> "It seems clear that the statute in question is arbitrary and unreasonable on its face. The Act does not prohibit all commercial activity on Sunday but prohibits only sales **at retail.** Therefore, the Act in question permits a man to engage in the manufacture of clothing on Sunday but prohibits a man from selling that same article of clothing on Sunday. It permits a sale of furniture at wholesale on Sunday but prohibits a sale on Sunday of the same article of furniture at

19. The court below assumes that when this Court deals with economic legislation almost "anything goes" with respect to classification. We have demonstrated at pp. 39-40, *infra*, that this assumption is contrary to the actual decisions of this Court. It should be observed that the distinctions here involved affect personal liberty. The laws restrict the right of the employee to do an otherwise innocent act simply because it occurs on Sunday. Equally, it affects the individual freedom of the customer who otherwise would shop in the store on Sunday. Cf. *Murdock v. Pennsylvania*, 319 U. S. 105, 111; *State Athletic Comm. v. Dorsey*, 359 U. S. 533.

retail. We can see no valid reason or justification for the Legislature to draw a distinction between a retail sale and any other type of commercial activity. If the Act is designed to provide a day of rest for the citizens of this Commonwealth (even assuming that the Legislature could impose restrictions upon commercial activity on one particular day) it would certainly seem that employees of wholesale establishments, factories and service establishments need their rest as much as do employees of retail stores.

* * * *

"In addition, the New Sunday Blue Law does not prohibit the retail selling on Sundays of all goods and commodities but only prohibits the retail selling of certain enumerated articles and commodities and for this reason also, it is arbitrary and discriminatory. For example, one is prevented by the Act from selling a customer a toy for his child but not candy for his wife. The Act prohibits the selling of a rake, but not grass seed. The Act does not prohibit the sale on Sunday of a house which may contain all sorts of kitchen equipment but does prohibit the retail sale of a ten cent can opener to be used in the kitchen. We could multiply these illustrations a hundred-fold to point out the incongruity of the Act in this respect. We are at a loss to understand how these distinctions can be justified on the basis of a valid exercise of police power."[20]

* * * *

"The law prohibits the sale on one day of the week of commodities in general use, the sale of which has never been generally prohibited and indeed could not be, because in most instances they are necessities of life, viz: clothing, furniture and the like. What con-

20. Appendix E, *infra*; pp. 70a-71a.

ceivable purpose can such a law have? Nothing in the nature of the commodity itself requires that its sale be subjected to regulation. By way of illustration, it is not a narcotic, to be restricted to sale upon prescription. It is not alcohol, to be sold only to adults. It is not milk, to be sold only upon compliance with sanitary requirements. In short, there is nothing intrinsic in the nature of the items covered by the Sunday law which affords any rational, nonreligious reason for prohibiting their sale on Sunday, as against any other day.

"What then, is it about Sunday that can sustain the legislation? We pass for the moment the religious implication of the day, because if the law has a religious purpose, then, as pointed out below, it would be unconstitutional for that reason.

"The Commonwealth contends that the Sunday law is appropriate in order to assure a day of rest, that at least one day's rest in seven is a proper health or welfare measure, and that Sunday may be selected as that day because of the difficulty of enforcing a rest law which does not designate a single day upon which all citizens must refrain from work and rest. We may assume all this to be valid, although I doubt that it is."[a]

---

[a] [6] For several reasons: (a) Pennsylvania, like the Federal Government and other States, has enacted a series of genuine labor laws covering comprehensively this subject. See, e.g., Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 Purd. Stat. § 103(a) (Women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended 43 Purd. Stat. § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 Purd. Stat. § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 Purd. Stat. § 481 (employes of motion picture theatres must be given one day of rest per week). (b) Many States (Arizona, California, Oregon, Wisconsin and Wyoming) have one-day-in-seven rest laws (See Sunday Laws, 25 S. Calif. L. Rev. 131, 134), and I know of no problem in connection with their enforcement, or with the enforcement of the labor laws referred to in (a) above. Indeed, such laws generally are enforced, whereas

but it does not save this law because the instant classification is arbitrary. I do not predicate this conclusion upon the exclusion from the law of persons making wholesale sales and indeed, persons engaged in all other industrial or commercial activities generally, although I can ascertain no reason why they are in less need of rest than retail sales people. However, such distinctions, whatever they may lack in common sense, at least have the imprimatur of tradition, albeit in other contexts.[7]

"This law forbids a clerk to sell to my blind neighbor a Dylan Thomas *recording*, but does not prohibit the same clerk from selling me a *book* containing exactly the same poems from the next counter. Side by side in Bargain City and many other stores are *tricycles*, which cannot be sold to me for my two-year old granddaughter because they are toys, and adult bicycles which I can buy for myself or for my daughter just out of her teens. A clerk may sell me seat covers for my automobile, but he cannot sell me slip covers for my sofa. If I have forgotten to shop for a birthday present for my wife during the week, the same store may sell me on Sunday, without violating this law, a camera, ice skates or a dozen roses, but not a watch or a suitcase or a tie pin for myself. It cannot sell me a

---

the sporadic or discriminatory enforcement of the Sunday laws is common knowledge, and tends to bring law enforcement generally into disrepute. (c) Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it. See, e.g., Kovacs v. Cooper, 336 U. S. 77, 88 (1949).

"[7.] It was argued by counsel for petitioners and not denied that some of the corporate interests supporting the "rest" law now at issue at the same time were attempting to get the Pennsylvania legislature to enact a law permitting bartenders to work in hotels on Sunday. It would seem to me that an overworked or tired bartender would do himself and his customers much more harm than a tired girl clerk selling slips as here complained of."

toy rubber football for the four-year old, but this law does not prohibit the sale of a football for the teenager, for one is a *toy* and the other is not, and *sporting goods* are not covered by this law.

"These examples could be multiplied endlessly by anyone strolling through Bargain City, a department store or a drug store with a copy of the law in his hand and the law must be kept in hand or exactly memorized, because there is no intelligible logical principle by which one may determine what is excluded and what is included. . . ."[21]

Such unreasonable and discriminatory classification is unconstitutional, denying to the plaintiff the equal protection and due process guarantees of the Fourteenth Amendment. Such classification fails to comply with this Court's requirement that "a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found." *Morey v. Doud*, 354 U. S. 457, 465; *Smith v. Cahoon*, 283 U. S. 553, 567; *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389; *Royster Guano Co. v. Virginia*, 253 U. S. 412; *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550. In each of the cited cases this Court has followed the rule that:

". . . classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible."

21. Appendix D, pp. 45a-47a, *infra*.

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, 406.

In what manner does a sale at retail differ from a sale at wholesale justifying different legislative treatment? If these are day-of-rest statutes, do not employees of wholesale establishments, factories and service establishments need rest, too? What of rest for persons making retail sales of commodities not listed in the Act of August 10, 1959 as against those contained therein? And what policy exempts souvenirs and novelties? Why can a baseball player, or a bus driver work seven days a week, but a clerk selling household items only six days? What policy permits an employee to work six days at appellant's retail establishment, then take a job on Sunday at the local baseball park, or work as a substitute in the local newspaper plant? Certainly the finding of fact of the court below that work on Sunday is the same as work on any other day in appellant's store destroys completely any contention that there is a basis for the classification. In addition, the fact that Pennsylvania and other States have laws prohibiting work of various kinds for more than six consecutive days makes completely unnecessary a law which prohibits work for a small segment of the population on one particular day. The Pennsylvania law also lends itself to the abuse of good government with which this record is replete (See Rec. 289). Judge Volker in *People's Appliance & Furniture, Inc. v. City of Flint*, 99 N. W. 2d 522, 530 (Supreme Court of Michigan, November 24, 1959), has aptly stated:

> ". . . there exists a curious and rather widespread judicial reticence when our courts are dealing with so-called Sunday ordinances. The judicial approach then often seems to become gingerly to the point of timidity, as though the fact that, however invalid such ordinances may be when judged by ordinary standards, after all most Sunday ordinances are plainly on the side of morality and all right-thinking people and, if they should err, they do so on the side of the angels.

If such a tendency exists (and we trust we are wrong), we can only observe that an unreasonably discriminatory or otherwise invalid ordinance is no less bad because it happens also to please the pious. It is bad enough that Sunday ordinances should ever unreasonably discriminate between our people; it is doubly bad should there ever be any hint of judicial discrimination in their interpretation as against the accepted rules of interpretation applying to ordinary ordinances. Yet this apparent double standard is particularly evident in Michigan, as I shall presently undertake to demonstrate. One had not heretofore been sufficiently aware of the fact that in Michigan there are evidently Sunday standards for judging Sunday ordinances. I am now aware and I do not like what I see."

The Pennsylvania statutes deny due process since they bear no "real and substantial relation to the public welfare, safety, morals or some other phase of the general welfare." *Liggett Co. v. Baldrige*, 278 U. S. 105, 111-112. Their only justification is religion, which is, by its very nature, constitutionally infirm.

The Record makes it clear that appellee McGinley enforced the statute against appellant's employees in a wilfully discriminatory manner. The court below was incorrect when it held that such discrimination by a state officer does not violate the Fourteenth Amendment unless the discrimination or "classification" which results from the official's wrongful actions is one which the state Legislature could not have brought about (Rec. 285). This is not the law. It would be a complete abandonment of the fundamental concept that ours is a government of law, not of men, and would conflict with the decisions of this Court: *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 100; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23. See *Yick Wo v. Hopkins*, 118 U. S. 356, 374; *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352.

This part of the case is not moot, although appellee McGinley is no longer in office. There are still pending criminal prosecutions against appellant's employees as the result of such discriminatory action. If it is here determined that appellee McGinley's conduct was unconstitutional, these criminal proceedings would have to be dropped. Cf. *People v. Harris*, Superior Court of California, June 10, 1960, 28 U. S. Law Week 2630.

III.

The Court Below Should Have Passed Upon the Constitutionality of the Act of 1794.

The Pennsylvania state court less than a year before the decision below had held that the Act of 1794 was applicable to appellant's employees, and appellee McGinley claimed in this Record that the Act of 1794 still applied to appellant (Rec. 275, 53-4). Appellant sells many items not covered by the Act of 1959, but covered by the language "all worldly employment" of the Act of 1794. In these circumstances it is clear that the doctrine of federal abstention, applicable where there is a possibility that a state court might interpret a state statute in such a way as not to apply it to the litigant, has no application. *Chicago v. Atchison, Topeka & Santa F. R. Co.*, 357 U. S. 77; *Public Utilities Commission v. United States*, 355 U. S. 534; *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185.

At least the federal district court should have continued its injunction until the parties had a reasonable opportunity to have the state law question determined in the light of appellant's constitutional objections to the statute. *Doud v. Hodge*, 350 U. S. 485; *Harrison v. NAACP*, 360 U. S. 167, 178-79.

H.

Conclusion.

For the reasons stated above, the order of the court below should be reversed with instructions to enter an order declaring unconstitutional the Pennsylvania Blue Laws, including the Act of August 10, 1959, and the Act of 1794, and to issue a permanent injunction preventing the enforcement thereof.

Respectfully submitted,

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Dated: October 4, 1960.

APPENDIX A.

The Expert Testimony.

Dr. Sidney B. Hoenig, an ordained Rabbi and Professor of History at Yeshiva University, an expert on the "inter-testimental" period—"from the destruction of the First Temple about 586 Before the Common Era until about the year 135 of the Common Era, and the Rabbinic Period beyond that, until about the Third or Fourth Century" (Rec. 58)—testified at length and without contradiction, that the Sunday Laws are religious laws.

He testified that until the end of the First Century both Christians and Jews observed the Sabbath on Saturday, the seventh day of the week (Rec. 59, 63). The New Testament clearly recognizes the Sabbath as being the seventh day of the week: "There are many references throughout the Gospels also of Jesus preaching in the Synagogue on the Sabbath Day . . ." (Rec. 59).

In the Second Century A. D., however, Christians and particularly those of Gentile origin, as distinguished from Christians of Jewish origin, determined to develop a religious day which would set them apart from the Jews (Rec. 67-8). It was decided, therefore, that Sunday should be considered as an additional religious holiday, to celebrate and honor the fundamental event of Christianity—the resurrection on Sunday of Jesus Christ. Thus, Sunday became known as the "Lord's Day," the day of the Resurrection of Jesus Christ (Rec. 63).[1] Christian religious

1. Reference to a standard King James Bible Concordance confirms the fact that Sunday celebration is based upon the Resurrection, not the Fourth Commandment. See A. J. Holman Company Bible of Philadelphia (1942), p. 129 of the Concordance; See also Rec. 95-96:

"Sabbath: The Rest day or seventh of the week; Gen 2:2, 3; became a Mosaic institution for rest and festal occasions; Ex 16:23-30; 20:8-11; Lv 19:3, 30; 23:3; 25:4-9; Dt 5:12-15; Day for Consulting Prophets; 2 K 4:23; A day of teaching and joy;

leaders wished to make Sunday the "choicest day of the week" (Rec. 70-1):

> "In other words, Sunday was a weekly resurrection, as Easter is the period of the annual resurrection, and it is associated with the Lord's Day of Resurrection generally." (Rec. 70)

But two centuries of purely religious activity failed to achieve the desired supremacy of Sunday over Saturday (Rec. 71), and so the Church turned to the State and first achieved enforcement of this Christian religious concept through the State in the reign of Constantine in 321 A. D., making Sunday by law a day of compulsory abstention from secular activities so that people would go to church to commemorate Christ's Resurrection (Rec. 66-8, 71).

The concept of the Resurrection and its compulsory commemoration by refraining from worldly activities is contrary to Jewish belief (Rec. 72-4). But more important, the State thereby forces the Jew to pay homage to the pivotal event and doctrine of the religion of another—the Christian, a doctrine which, rightly or wrongly, but without doubt, has contributed to the Jews' degradation in the past and to the feeling today that he is inferior and an alien.

For example, as Professor Hoenig pointed out, in the 15th Century every Christian was obliged to slap Jews on Easter (Rec. 71, 72):

> "Q. Why did the Church want the first day, or Sunday, as the day of rest?
>
> A. Well, I think it is natural to understand that the very fundamental and basis is the belief in Christ.

Neh 8:1-12; Hos 2:11; **Among Christians of the Third and Fourth centuries the day after the Hebrew Sabbath, the seventh day, gradually until well established was substituted for the Sabbath and called Sunday, the first day in commemoration of the resurrection of Christ; also by some called Lord's Day;** Our Lord's mode of observing the Sabbath was one of the main features of his life, which his Pharisaic adversaries most gladly watched and criticized." See also fn. 1, p. 5, *supra*.

Q. Was there at any time any activity, action or recommendation on the part of the Church specifically directed against Jews in connection with the observance of Easter or Sunday as the day of resurrection?

A. We do find in the course of Jewish history that when Easter came about, Easter Sunday especially, the Jew suffered immensely. In fact, it was the custom to take a Jew and to slap him on the Easter Sunday, until later on it was changed, and the Jew had to give a Jew's penny. That was all in commemoration of the resurrection. I quote here from a Social and Religious History of the Jews by Professor Baron, who mentions:

> 'During the Holy Week in particular the passion of Christ and His resurrection offered provocative themes of anti-Jewish assaults in theory and practice. We recall the need of special protective legislation and the frequent prohibition for Jews to appear in public streets less they further inflame the aroused passions.'

Q. Do you agree with the testimony which Dr. Solomon Grayzel of the Jewish Theological Seminary gave in a recent case summarized by a three-judge court[2] to the following effect: Dr. Grayzel cited the famous scene portrayed in Matthew 27, the trial of Jesus Christ before Pilate. He pointed out that as related in the Christian New Testament the Jews are portrayed as refusing to exchange Barabbas for Jesus but insisted upon crucifixion in spite of the attempts of Pilate to placate the mob. He cited the washing of hands by Pilate, and then the Verse 25: 'Then answered all the people and said, His blood be on us and our children.' Dr. Grayzel stated that this had been the cause of more anti-Jewish riots throughout the ages than anything else in history.

2. *Schempp v. School Dist. of Abington Township*, 177 F. Supp. 398 (E. D. Pa., 1959).

A. I fully agree with Dr. Grayzel's statement. In fact, I made a special study of this particular feature. I wrote a book on the Great Sanhedrin, the origin and development of the great court in the Second Commonwealth period, and it dealt with this element of the crucifixion, an historic angle (Rec. 72).

Professor Hoenig testified further:

"What is the attitude of the Jew with regard to the observance of Sunday?

A. Observance of?

Q. Of Sunday. What does it signify or symbolize to a Jew to be compelled by law to refrain from working on Sunday?

A. **If a Jew is compelled to observe the Sunday, if he is forced to observe the Sunday, it would be basically considered as forcing him to recognize the resurrection of Jesus.** He may be idle, that would be something else, but that does not in any way consider that he—the Bible tells us: 'Six days shalt thou work. Which means, according to Rabbinic interpretation, men should work on six days; he shall not be idle.

Judge Welsh: Would that forcing that you just referred to, Doctor, be considered as a forcing of a philosophical doctrine, or a physical command, or a political prohibition?

The Witness: **It would be the recognition of a theological doctrine which is forced upon the Jew if he is made to observe the Sunday.**" (Rec. 72-4)

He also testified that the phrase "Lord's Day" necessarily means the day of the Resurrection (Rec. 61, 62-4, 74), and he "would recognize that Sunday is associated with the Lord's day" (Rec. 82).

Finally, in answer to a direct question by the appellee he stated that the Amendatory Act of August 10, 1959 has

the same effect with respect to the religious controversy as did the earlier Sunday Laws (Rec. 79-82):

"Q. But, as a matter of fact, today, and recognizing the fact that the environment may consist of a preponderance of Christians, do you think that Jews today feel that they are being put upon because they can't work on Sunday?

A. I think they do.

Q. All Jews?

A. Most Jews do. I cannot speak for every Jew, because just as there are in the Christian faith so many minds and sects, so among Jews you have various opinions. Even in any school you have various opinions of different philosophers.

Q. So that at least there is among Jewish groups the opinion that it is perfectly all right not to work on Sunday regardless of whether or not the law exists?

A. **Yes, but they don't want to be compelled to observe the Sunday.** Every Jew, no matter whether he is of the extreme, wants to be allowed the full freedom. If he wants to work on the Sunday he shall not be compelled to say that he must observe Sunday."

This testimony is supported by many authorities in the Jewish tradition.

The Jewish Encyclopaedia[3] tells us that Jesus and his disciples kept the seventh day as the Sabbath, and that it was the author of the Epistle of Barnabas who adduced the occurrence of the Resurrection on the first day of the week as the reason for the observance of this "true day."

In discussing the first Sunday law enacted by Constantine, the writer in the Jewish Encyclopaedia states that it was this decree which "virtually sanctioned the recognition of Sunday as the sole day of rest, the 'Sabbath,' and thus **consummated the tendency that had been developing in the**

3. Vol. X, pp. 603-604. The article is by Emil G. Hirsch, noted Rabbi and Professor of Rabbinical Literature and Philosophy at the University of Chicago.

Christian church for nearly two centuries to substitute the day of Jesus' resurrection for the Jewish Sabbath. In this way Sunday was given an anti-Jewish significance in accordance with Paul's contention that the Resurrection abrogated the old dispensation and the Law." (Boldface supplied.)

To Orthodox Jews, who from time immemorial have regarded the sanctity of the seventh day of the week as the chief cornerstone of their religion, the Sunday law is particularly antipathetic. For them a governmental decree directing them to observe Sunday as the day of rest is a reminder not only of what their ancestors throughout the Middle Ages endured by reason of the formidable power of the combination of Church and State, but that they are still a minority in a Christian country, enjoying by sufferance a status something less than full and equal citizenship. And certainly this may be expected to cause in them "a feeling," to borrow a phrase from the Chief Justice of the United States used in another, but apposite context, "of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education of Topeka*, 347 U. S. 483, 494.

For an account of how the Christian Church's celebration of Holy Week *often* caused the state to take harmful action against Jews, see MALCOLM HAY, "THE FOOT OF PRIDE," (1950) 102-104, 88-89, 36-37; GRAYZEL, "THE CHURCH AND THE JEWS," pp. 304-305, 316-317, 332-333, 334-335.

The original Constitution of the United States, with its stipulation that no religious test should be required as qualification for any public office or post of trust, marked the dawn of the modern era of Emancipation of the Jews.[4]

4. It was not until September 27, 1791 that for the first time in the history of modern Europe the Jews of France were formally admitted as equal citizens of the country of their birth. ROTH, "HISTORY OF THE JEWISH PEOPLE," p. 341.

The beginning of the Bill of Rights: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," was hailed by the Jews as the first attempt to guarantee the separation of church and state, and to end temporal interference with religious liberty.

It is easy to understand, therefore, why American Jews have been alarmed by such occasional judicial utterances as "this is a Christian nation,"[5] and "Christian religion is a part of the common law of Pennsylvania."[6]. The concept of Pennsylvania as "a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor," is the true basis of the decision upholding the constitutionality of the Sunday law of 1794 in *Specht v. Commonwealth*, 8 Pa. 312 (1848).[7] The reaction on the part of the Jews to the idea that Sunday laws are valid because this is a Christian commonwealth was forcefully expressed in "The Occident and American Jewish Advocate," the monthly periodical edited by Issac Leeser, the outstanding spiritual leader

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5. *Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 471.

6. *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, 198.

7. Justice Coulter's concurring opinion clearly presented the actual, rather than the pretended, basis for the Sunday law: "I wish it to be distinctly understood that I believe the laws constitutional, because they guard the Christian Sabbath from profanation, and, in the language of the act of 1794, prohibit work or *worldly* employment on the *Lord's Day*.

"We are a Christian people and state; we are part and parcel of a great Christian nation. All over the length and breadth of this great nation, the Christian Sabbath is recognized, and guarded by the law as a day of sacred rest.

"It was one of the primitive institutions of Christianity—one on the existence of which its continuance depends. General Christianity enters into the very frame of our social existence; it is a part of the common law of the state. Law and order springing from the same source, the bosom of the Almighty, lean upon it for support. Our memories of the past—our hopes of the future are dependent upon it. Why then should the Supreme Court not regard it, as our forefathers regarded it, and as the statute declares it to be—the Lord's Day?"

and spokesman of the Jewish people during the middle of the nineteenth century. Writing of "the fiction of a Christian State,"[8] Leeser declared: "It so happens that Christians in America have precisely such a hankering for dominion which the Constitution under which we live especially denies them; and the only way they contrive to keep alive this feeling, this inordinate love for power, is by pretending to believe in the existing of no other persons in the Commonwealth than themselves, the Christians . . . We must therefore think it very bad taste indeed, to call it nothing worse, that when religion or religious observances are spoken of, to forget altogether that there are other religionists than Christians, and other observances than those founded on their system of faith. We contend that we are a part of the commonwealth; as much citizens as all others; equal in the eye of the law, being so by the spirit *and* letter of the constitution."

In commenting upon "the retrograde movement lately attempted in various parts of the United States" to enact Sunday laws, Leeser stated "that the Courts could not be depended upon for a certainty to decide in favor of what is right; but they would, in all probability, be biased by their own or the public opinion on religion." After the Supreme Court of South Carolina handed down its opinion in the case of *City Council v. Benjamin*,[9] and shortly be-

8. In November 1848 "Occident", vol. 5, p. 403, in connection with the Governor's Thanksgiving Proclamation. Leeser was the most distinguished Rabbi in America in his day, and a vigorous proponent of liberalism. WOLF AND WHITEMAN, HISTORY OF THE JEWS OF PHILADELPHIA (1954), p. 373.

9. 2 Strobhart's L. Rep. 508, at p. 521 (S. C. 1848). The opinion of Judge William Rice in the 1846 Term of the City Court, in favor of Benjamin is interesting. He wrote:

> "In a community where there is a complete severance between Church and State, and where entire freedom of religious faith and worship is guaranteed to all its citizens alike, without discrimination or preference, the observance of any particular day, in a religious sense, is a matter of mere ecclesiastical or religious discipline and authority, and in no way pertaining to the civil

fore the *Specht* case was decided, Leeser wrote: "We deeply lament that our prognostications were so completely verified." He denounced "the fallacy" that Christianity is by the common law the law of the land, and he declared that "all decisions of courts and juries, based upon such an assumption, must ultimately be reversed by the Supreme Court of the United States, or by the sure action of public opinion. In the meantime we can wait, and watch well the progress of events, not doubting that the *right* will triumph at last." [10]

Elder Robert L. Odom, an editor and historian of the Seventh Day Adventist Church (Rec. 83), confirmed Professor Hoenig's testimony with respect to the origin and present purpose and effect of the Sunday observance laws (Rec. 84-87). He forcefully evidenced the severe hardship and handicap occasioned Seventh Day Adventists and others similarly situated (such as Seventh Day Baptists and Seventh Day Church of God (Rec. 90)) by laws which require the cessation of work on Sunday:

> "Q. What is the position of yourself and your faith, the Seventh Day Adventists, with regard to a law which requires you to observe Sunday by refraining from work; and, if you need, give an explanation as to why.
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power or legislative authority of the State, . . . Is it no discrimination or preference, to select by the civil law of the State, the day considered sacred in a religious sense by the Christian, and to compel the Jew to unite externally, at least, in its observance; to protect from possible disturbance those who worship on that day, by requiring all others to abstain from every species of labour and employment, while the Jewish Sabbath is protected by no similar regulation? In the view of the constitution, are not the Jewish Sabbath and the Christian Sunday precisely equal, and those who worship God upon one or the other day, entitled to a perfect equality of immunity and privileges? . . . ." 2 Strobhart's L. Rep. 508, at p. 512; see *The Occident*, IV March, 1847, pp. 558-595.

10. "THE OCCIDENT", Vol. 6, pp. 39-40 (April 1848).

A. Our principal objection is this, and we believe that it is Christian and historically American: That force, coercive, compulsory measures should never be used to compel any people to observe religious days under any pretext whatsoever.

We believe that that was the mistake that was made by Constantine, the six Sunday laws that set the precedent for it, because these things very often are like the camel's nose. If the state can step in and say, now, here are the Jews, and the Seventh Day Adventists, the Seventh Day Baptists, the Seventh Day Church of God, and a number of others that I could mention—in Washington, D. C., we have two Moslem Temples where they observe Friday, or at least some of their followers do, because that is the day of assembly in the Moslem world. If the state steps in and dictates that everybody, regardless of creed or race or conviction shall rest upon that day, we feel, first of all, that the individual is being denied a God-given right to work six days, to do his work within six days; that that is in the commandment. Then another——

Q. What is in the commandment?

A. In the Fourth Commandment of the Decalogue: Six days shalt thou labor and do all thy work.

That we are denied that privilege.

Furthermore, an objection that we have is that after we have devoutly kept ourselves, paid our taxes to support this Government, to support these courts, to support these law enforcement officers, our Congressmen, our President, and all of that, we feel that it is unjust to compel us to observe the day of rest of **another segment of Christianity, and be put in a category of second-class citizens.**

In other words, we are being denied a privilege of laboring six days, whereas the other group can work the first five days of the week, and then open full-

wide—and we have no objection if they do it. But open full-wide on our holiday of rest and carry on.

We believe that under the law we are created equally entitled to just consideration, and any Sunday law that allows no exemption and provides nothing of the kind—as the Pennsylvania Sunday Law does—is an injustice, because besides denying us the God-given right of working six days a week we are compelled to lose one day out of every fifty-two weeks of the year of work, and therefore nearly 17 per cent of our income, and our children, our babies, our wives and just as precious in the sight of our Saviour and our God as the wives and children of others; they need to eat, they need their shoes. **And why should we be placed in a category of second-class citizens?**

If we keep our holy day we are penalized by being deprived of one day's work, one day's income; if we violate the law then we are fined up into hundreds of dollars and perhaps imprisoned.

So we regard this whole thing as unjust and we feel, furthermore, that it is wrong." (Rec. 89-91) (Bold face supplied.)

The evidence of Dr. Odom was not contradicted.

APPENDIX B.

Christian Religious and Lay Writings Regarding Sunday as a Religious Day Honoring the Resurrection.

Christian religious and lay authorities likewise have recognized the significance of Sunday as the weekly commemoration of the Resurrection, and the compulsory abstention from work as a symbol of honor to and faith in this pivotal Christian religious tenet.[11]

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11. Reference to a standard King James Bible Concordance confirms the fact that Sunday celebration is based upon the Resurrection, not the Fourth Commandment. See A. J. Holman Company Bible of Philadelphia (1942), p. 129 of the Concordance:

> "Sabbath: The Rest day or seventh of the week; Gen 2:2, 3; became a Mosaic institution for rest and festal occasions; Ex 16:23-30; 20:8-11; Lv 19:3, 30; 23:3; 25:4-9; Dt 5:12-15; Day for Consulting Prophets 2 K 4:23; A day of teaching and joy; Neh 8:1-12 Hos 2:11; **Among Christians of the Third and Fourth centuries the day after the Hebrew Sabbath, the seventh day, gradually until well established was substituted for the Sabbath and called Sunday, the first day in commemoration of the resurrection of Christ; also by some called Lord's Day;** Our Lord's mode of observing the Sabbath was one of the main features of his life, which his Pharisaic adversaries most gladly watched and criticized."

The word "Sabbath" is derived from the Hebrew *"shabbath,"* meaning day of rest. WEBSTER'S NEW INTERNATIONAL DICTIONARY (Merriam 2nd Ed. unabridged, 1955), p. 2191.

The following appears, inter alia, in the same dictionary with regard to the word "Sunday", at page 2528: "The first day of the week, regarded by most Christians as a day for rest from secular employments and for religious worship; the Christian Sabbath; the **Lord's day.** It is kept as a weekly commemoration of the **day of Christ's resurrection** and as the Christian analogue of the Jewish Sabbath. SUNDAY, SABBATH are not strictly synonymous terms. Sunday is the name of the first day of the week; Sabbath designates the institution rather than the day, and is synonymous with **Sunday** only in Christian usage, inasmuch as the Jewish **Sabbath** falls on Saturday. As a designation of the day, **Sunday** is preferred to **Sabbath.**"

In AMERICAN MAGAZINE, the NATIONAL CATHOLIC WEEKLY REVIEW, Vol. 91, pages 517-518, August 28, 1954, James M. Shea, who is an editor of the Cincinnati Catholic Telegraph Register, traced the history of Sunday observance. The article states that St. Justin explained to the Pagans of Rome that "the day of the sun is the day of our common assembly to begin with because it is the first day, the day on which God transformed darkness, but we assemble on this day above all because this is the very day Jesus Christ our Saviour rose from the dead."

The article also quotes the following from St. Augustine:

"This seventh day shall be our Sabbath, whose end shall not be the evening, but the Lord's day, as the eighth eternal day which is consecrated by the resurrection of Christ, prefiguring the eternal rest not only of the spirit but also of the body."

In another work it is stated:

"Nearly all the States have laws enforcing the observance of Sunday as the Sabbath, and not unfrequently individuals are arrested and fined for doing work or indulging in amusements on that day, when their acts in no way disturb others. If the State is independent of the Church, what right has it to require the observance of one day as a Sabbath more than another? And how can it punish any man for doing work at any time, when he does not thereby infringe on the rights of other members of society? The judicature of the country is disgraced, so long as our courts serve as tribunals for such sectarian purposes." *The Practical Separation of Church and State, B. F. Underwood* (1876), in BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA (1949), p. 214.

Blackstone was of the same opinion. For example, in the ninth edition of his COMMENTARIES ON THE LAWS OF

ENGLAND (1783), Vol. IV, he classifies in Chapter 4, under the heading "Offenses Against God and Religion": those offenses "which are more immediately injurious to God and his holy religion (the Established Church of England)". He writes:

> "Profanation of the lord's day, vulgarly (but improperly) called **Sabbath-breaking** is a ninth offense against God and religion, punished by the municipal law of England. . . . the laws of king Athelstan forbad all merchandising on the lord's day, under very severe penalties. And by the statute 27 Hen. VI. c. 5. no fair or market shall be held on the principal festivals, good friday, or any sunday, (except the four sundays in harvest) on pain of forfeiting the goods exposed to sale. And, since by the statute 1 Car. I. c. 1. no person shall assemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other *unlawful* exercises or pastimes; on pain that every offender shall pay 3s 4d to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to *work* on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings." (pp. 63-64)

In THE SURVEY MAGAZINE, Vol. 26, page 854, September 16, 1911, a leading article entitled "*A Challenge to the Church*" written by John A. Fitch stated:

> "Sunday laws in the United States were put on the books through the efforts of churchmen. They

are no more rest-day laws, these restrictions that have come down in America from colonial days; like the fourth Commandment of the Mosaic law, they are designated to protect the Sabbath from desecration. They do not generally designate the day of rest as 'Sunday' but as 'the first day of the week, commonly called the Sabbath' and one state at least described the day as 'the Sabbath, commonly called the Lord's day.'"

As is stated in Hitchler, *The Legal Crusades of the Sabbatārians*, 32 DICK. L. REV. 129, 138 (1928):

"The motive of those who enacted the Sunday law was unquestionably to prohibit the profanation of a day regarded by them as sacred, and even if this were not the motive, the effect of the law was to give a preference to one religious sect over others. The law was passed in pursuance of the idea that Christianity should be specially favored by law. Its purpose was to protect the Christian Sunday from desecration and it favors the Christian religion to the exclusion of others." (p. 138)

Nor are these views confined to opponents of Sunday laws. Quite the contrary, some of the most vigorous expressions of the religious nature of these laws have come from their staunchest advocates, including the Lord's Day Alliance:

"Our civil laws are necessary to protect the church in her opportunity on this day . . . The State by its laws declares secular labor or secular amusements on Sunday to be a misdemeanor or a crime, punishable by a fine or imprisonment or both. Thus the State helps to keep alive in the conscience of the people the unique and sacred character of the day. **This aids religion** because it helps to maintain throughout the day a moral atmosphere favorable to

church-going and the performance of religious duties. Thus the State, while not commanding the religious observance of the day (it must not do this), commends it.

"If the people properly observe the Sabbath, they will be found in the House of God on that day. Remove these counter-attractions and distractions of the day and it will prove far easier to woo and win back the multitude of young people who have lost their way to the Bible School and the church. Close up the Sunday movies, shut the gates of the baseball parks, lock the doors of many open places of business, make more attractive though nonetheless spiritual the meetings of the church, and this paramount problem of the churches will be well on the way to a definite solution.

* * *

"All we demand is that the church be safeguarded in its fundamental rights to be free from disturbances and from distractions, and that temptations to break the Sabbath be withdrawn from the people . . . I feel that the time has come when the church must make the Sabbath so sweet and wholesome that all roads on Sunday will lead to church." AMERICAN MERCURY, May, 1928, Vol. 14, pp. 91-98, quoting from a pamphlet distributed by the Lord's Day Alliance and from a statement by Rev. Harry Laity Bowlby, General Secretary of the Lord's Day Alliance.

In 1829, when the agitation against Sunday mail had reached its peak, the Congress of the United States specifically rejected the demand it be discontinued, on the ground that to bow to it would violate the First Amendment:

"Should Congress, in their legislative capacity, adopt the sentiment, it would establish the principle

that the Legislature is a proper tribunal to determine what are the laws of God. It would involve a legislative decision in a religious controversy, and on a point in which good citizens may honestly differ in opinion, without disturbing the peace of society, or endangering its liberties. If this principle is once introduced, it will be impossible to define its bounds. Among all the religious persecutions with which almost every page of modern history is stained, no victim ever suffered but for the violation of what Government denominated the law of God. To prevent a similar train of evils in this country, the constitution has wisely withheld from our Government the power of defining the divine law. It is a right reserved to each citizen; and while he respects the equal rights of others, he cannot be held amenable to any human tribunal for his conclusions.

"Extensive religious combinations to effect a political object are, in the opinion of the committee, always dangerous." SENATE DOCUMENT, 20TH CON., 2D SESS., REPORT NO. 46; see MARK, THE FAITH OF OUR FATHERS (pp. 272-273).

In his Memorial to the Massachusetts Constitutional Convention in 1853; John Barnes stated:

"We submit, that all laws for enforcing the observance of the Sunday are projected upon a religious creed; that Constitutional authority, therefore, is a direct Constitutional establishment of religion; and we hold that such establishment is contrary to every principle of a free government; that the State can only enforce the creeds of any church, or the observance of any religious ceremonial, but by sacrificing its democracy, and becoming 'an engine of combined clerical and political usurpation.'" MARK, THE FAITH OF OUR FATHERS, p. 286.

Divergent Christian Religious Doctrines as to the Proper Observance of Sunday.

The divergence of religious views on Sunday Laws is not solely between Jews or seventh day Sabbatarians on one hand and Christians on the other. The precise type of Sunday observance to be incorporated into law has long been a subject of controversy between Catholic and Protestant, and among Protestant sects, sometimes of bitter controversy.

The following is quoted from a book written in 1845 by a Philadelphian, William Logan Fisher, HISTORY OF THE INSTITUTION OF THE SABBATH DAY,[12] pp. 63-66:

> "As the Puritans gained power in England, the whole nation became convulsed with the most frivolous disputes. It was not only the great leading doctrine, 'That saving grace is not given, or communicated, to all men, and that those who are not predestinated to salvation, shall necessarily be damned,' that distracted the country, but the government itself was thrown into violent convulsions respecting the use of the surplice, the rails placed about the altar, the ring in marriage, the cross in baptism, and other rites which Hume calls mean and contemptible. But they were not contemptible, if they involved *principle*.
>
> "By the Puritan book of discipline, the minister was not allowed to baptize children by the names of Richard, Robert, &c., which savoured of paganism: they were to use Scripture names such as Obadiah, Zephaniah, Hezekial, &c., which are so common among the descendants of the Puritans at the present day: and to the same source are we indebted for such names as Deliverance, Virtue, Fear, Hope, Charity, Thankful,

12. An indignant reader has written the epithet "an infidel" across the title page of the copy in the Library Company of Philadelphia. Such unintentional betrayal by advocates of Sunday Laws of their feeling that the issue is fundamentally religious is significant, as are the letters to newspapers and the rather more abusive anonymous letters to appellant's counsel.

Consolation, Praise God, The Lord is Near, and a variety of others of the same character. The three first children that were baptized in Boston church, were named Joy, Recompense and Pity.

"It was Doctor Bound, one of the rigid Puritans, who applied the name Sabbath to the first day of the week, about the year 1595. He published a book upon the occasion, particularly decrying the Romish festivals, in which he stated that the church of Rome had joined many other days to the seventh day, making them equal, if not superior, as well in the solemnity of divine offices, as in restraint from labour; that the commandment for sanctifying every seventh day in the Mosiac Decalogue, is natural, moral and perpetual, and that the church had no authority to sanctify any other day.

"This new Sabbath doctrine, as it was called, of Bound's, met with violent opposition from the Episcopal and other churches. Archbishop Whitgift condemned the book, and Rogers, another clergyman, said, 'that it was the comfort of his soul, and would be to his dying day, that he had been the man and the means that the Sabbatarian errors were brought to the light and knowledge of the state.' To counteract this doctrine, the book 'concerning lawful sports, to be used on Sundays after divine service,' which had been heretofore issued, was republished by king Charles I., with an order that it should be circulated through all the parish churches. This allowed of all kinds of diversions on Sunday; and the king declared, that it was done 'out of pious care for the service of God, and for suppressing of those humours that oppose truth, and for the ease, comfort, and recreation of his majesty's well deserving people.' The bishops recommended these recreations, 'as bringing the people more willingly to church, as tending to civilize them, and to compose differences among them, and as serving to

increase love and unity.' The Puritans were of a different mind, and violently opposed them; many of the clergy refused to read the king's orders in their churches. The animosity was very severe, and was carried on for many years. The whole argument of the Sabbatarians, seemed to rest upon the Mosiac code. It serves to show the error of trying to make the consciences of men depend upon state laws. What is sanctioned in one age is condemned in another, from the particular caprices of those who may happen to be in power.

"It is stated that every passage in the Bible, whether relating to the legal Sabbath, or to the spiritual Sabbath of the soul, was tortured to prove their position; and it was carried to such a length, that chief justice Popham commanded these books to be called in, and neither be printed nor made public for time to come.

"This is believed to be the origin of the term Christian Sabbath, a name which has not generally been adopted among Christians, and it ought never to be adopted, because, applied to a day, it is a falsehood.

"**The Puritanical zeal upon the subject, appears to have had no other foundation than the attempt to gain power by destroying festivals which were sustained by the Romish and Episcopal churches.** Pretending to consider themselves peculiarly the church of Christ, their fanaticism was directed against every thing which they had not themselves created."

To the same effect is a more recent and comprehensive study by a churchman and proponent of the modified Sunday law, STOKES,[13] CHURCH AND STATE IN THE UNITED STATES, Vol. III, pp. 154-156, 157-158, 168-169:

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13. Doctor of Divinity, former Secretary of Yale University and Canon of Washington Cathedral.

"In 1828 a general union for the observance of the Sabbath had been organized in New York. In 1844 a National Sabbath Convention was held in Baltimore, attended by 1,700 delegates from eleven states, with the Honorable John Quincy Adams (1767-1848) presiding. Dr. Justin Edwards (1787-1853) was the effective secretary of the American and Foreign Sabbath Union (founded in 1842), which was the main support of this movement. He was the author of the broadly distributed 'Permanent Sabbath Documents', and was a typically sincere but somewhat narrow Protestant reformer of the time, interested especially in temperance, tract distribution, Sunday observance, and Christian education.

"This effort was due largely to the dangers which seemed to conservative Protestants to threaten the country, on account of the large immigration from Europe of a population accustomed to what is generally called the continental Sunday. Other factors contributed, such as the development of railroads, with Sunday railroad schedules; the growth of Sunday newspapers; and certain forms of Sunday entertainments. But the immigration situation, especially in the large cities of the East, was uppermost in the minds of those who called the National Sabbath Convention.

"It must not be thought, however, that they represented all the intelligent public opinion of religious people in the country. Many persons sympathetic with the Christian traditions of the nation believed that Sunday legislation, especially in any rigid form, was contrary to the fundamental principles of Church and State separation on which the nation was founded. They felt that Sunday observance was an individual matter, not one for municipalities, state legislatures, and Congress to deal with.

"A remarkable expression of this view was by William Lloyd Garrison (1805-79). It was in the form of an appeal in 1848 for an American Anti-Sunday Law Convention. It was a direct reaction to the National Sabbath Convention of 1844 and the work of the American and Foreign Sabbath Union. As Garrison's appeal sums up effectively the view of most opponents of Sunday legislation, and as it is little known, it is here reproduced at some length.

"*To the Friends of Civil and Religious Liberty:*

'The right of every man to worship God according to the dictates of his own conscience is inherent, inalienable, self-evident... Yet it is notorious that, in all the States, excepting Louisiana, there are laws enforcing religious observance of the FIRST DAY OF THE WEEK AS THE SABBATH, and punishing as criminals such as attempt to pursue their usual avocations on that day,—avocations which even Sabbatarians recognize as innocent and laudable on all other days. It is true, some exceptions are made to the rigorous operation of these laws, in favor of the Seventh-Day Baptists, Jews, and others who keep the seventh day of the week as the Sabbath; but this freedom is granted in condescension to the scruples of particular sects, as a privilege, and not recognized as a natural right. For those (and the number is large, and steadily increasing) who believe that the Sabbath was exclusively a Jewish institution,—"a shadow of good things to come", which vanished eighteen hundred years ago before the light of the Christian dispensation, and therefore that it constitutes no part of Christianity,—there is no exception from the penalty of the law; but, should they venture to labor even for bread on that day, or be guilty of what is called "Sabbath desecration", they are liable either to fine or imprisonment!... Cases of this kind

have occurred in Massachusetts, Vermont, Pennsylvania, and Ohio, within a comparatively short period, where conscientious and upright persons have been thrust into prison for an act no more intrinsically heinous than that of gathering in a crop of hay, or selling moral or philanthropic publications. There is, therefore, no liberty of conscience allowed to the people of this country, under the laws thereof, in regard to the observance of a Sabbath day.

'In addition to these startling facts, within the last five years a religious combination has been formed in this land, styling itself "THE AMERICAN AND FOREIGN SABBATH UNION", whose specific object it is to impose the Sabbatical yoke yet more heavily on the necks of the American people. In a recent appeal made for pecuniary assistance by the executive committee of the Union, it is stated that "the Secretary (Rev. Dr. Edwards) has visited twenty of the United States, and traveled more than thirty thousand miles, addressing public bodies of all descriptions, and presenting reasons why, as a nation, we should keep the Sabbath,—all secular business, traveling, and amusement be confined to six days in a week,—and all people assemble on the Sabbath, and worship God." A "permanent Sabbath document" has been prepared by the Secretary; and "what has already been done will put a copy of this document into more than three hundred thousand families." Still greater efforts are to be made by the "Union" for the furtherance of its object.

'That this combination is animated by the spirit of religious bigotry and ecclesiastical tyranny—the spirit which banished the Baptists from Massachusetts, and subjected the Quakers to im-

prisonment and death, in the early settlement of this country—admits of little doubt. It is managed and sustained by those who have secured the enactment of the penal laws against Sabbath-breaking (all that the spirit of the times will allow), and whose disposition it manifestly is, if they can increase their power, to obtain the passage of yet more stringent laws against those who do not "esteem one day above another," but esteem "every day"—who are not willing that any man shall judge them "in respect of a holy day, or of the new moon, or of the Sabbath"—and who mean to "stand fast in the liberty wherewith Christ hath made them free, and not to be entangled again with the yoke of bondage." Its supporters do not rely solely upon reason, argument, persuasion, but also upon brute force—upon penal law; and thus in seeking to crush by violence the rights of conscience, and religious liberty and equality, their real spirit is revealed as at war with the genius of republicanism and the spirit of Christianity.

'Believing that the efforts of this "Sabbath Union" ought to be baffled by at least a corresponding energy on the part of the friends of civil and religious liberty; . . .

'We, the undersigned, therefore, invite all who agree with us essentially in these views of the Sabbath question, to meet IN CONVENTION, in the city of Boston, on THURSDAY and FRIDAY, the 23rd and 24th of March next, to confer together, and to decide upon such measures for the dissemination of light and knowledge, on this subject, as may be deemed expedient.

'In publishing this call for an ANTI-SABBATH CONVENTION, we desire to be clearly understood. We have no objection either to the first or the

seventh day of the week as a day of rest from bodily toil, both for man and beast. On the contrary, such rest is not only desirable but indispensable. . . .

'We are aware that we shall inevitably be accused, by the chief priests, scribes, and Pharisees of the present time, as was Jesus by the same class in his age, as "not of God", because we "do not keep the Sabbath day"; but we are persuaded that to expose the popular delusion which prevails on this subject is to advance the cause of a pure Christianity, to promote true and acceptable worship, and to inculcate strict moral and religious accountability in all the concerns of life, ON ALL DAYS OF THE WEEK ALIKE. . . .'

"It is doubtful whether the proponents of Sunday legislation produced as able a document. They seem to us to have been right in wishing to preserve the spiritual values in the weekly day of rest, but wrong in wishing to accomplish their purpose through rigid legislation to bulwark the inherited mores and religious teachings.

"From the time of this controversy the 'Sunday question' has been prominent, especially in states with a large Roman Catholic urban population wishing to have the laws relaxed; and a well-organized Protestant group, generally led by Presbyterians, Methodists, and Baptists, determined not to permit any change which would bring in the wide-open 'Continental Sunday'. The fight has been long and stubborn, with the liberal forces gradually gaining ground.

* * * *

"The typical Catholic and Protestant conceptions of Sunday laws and Sunday observance differ considerably. The Catholic is more liberal, though both, as a matter of theory, place almost equal emphasis on

church attendance. The Catholic emphasis is more definitely on worship—the mass—less on preaching; and the Roman Catholic is much more successful in transforming theory into practice in this matter. Probably more than three-quarters of Roman Catholics in the United States attend Sunday mass fairly regularly, while outside of villages and small towns and the rural South few communities show half as large a proportion of Protestant worshipers.

"The difference is the more striking in the matter of Sunday observance laws. Though both groups lay equal emphasis on the rights of labor to a day of rest, the Roman Catholic Church as distinct from Protestantism is not much interested in Sunday laws. The Catholic theory is that as long as a member of the Church attends mass, he may spend the rest of the day in any way he likes that is not evil or offensive to the public. Professional baseball games, parties, the theater, are for him all perfectly legitimate. The Catholic therefore does not join the Protestant in appearing before legislatures in opposition to Sunday commercial sports as long as these do not interfere with the regular Sunday morning church hours. The continental view has been growing considerably of late on the fringes of Protestantism, especially in urban centers.

* * *

"There is frequently conflict between Church and State over laws regarding Sunday amusements. In general these are being relaxed wherever cosmopolitan urban populations so demand, but local Protestant Church federations generally oppose such relaxations, especially when they involve commercialized sports or theatrical performances. Indeed, the organized Protestant forces of an American community are generally dominated by Presbyterian, Baptist, and Methodist

groups which are ardent supporters of stricter Sunday laws.

"But there are exceptions. Episcopalians are apt to be more liberal, though they do not go as far as their Roman Catholic brethren in this direction. Here and there, and especially in the large cities, an outstanding Protestant minister is found who does not believe in strict Sunday laws. A striking example of this attitude was provided by Alexander Campbell (1788-1866), co-founder with his father of the Disciples of Christ. He took the ground that Sunday laws were unscriptural and unchristian; that there was not a precept in the New Testament to compel any man by civil law to regard the day; and that to try to command those who did not believe in the Christian religion to observe it, is 'anti-evangelical or contrary to the gospel'. This is substantially the view of the Jews—who would, of course, substitute the teaching of the Old Testament for that of the New—and of the Seventh Day Adventists. The latter are continually carrying on from their national center in Takoma Park, Maryland, a vigorous but dignified campaign in opposition to all restrictive Sunday legislation.

"A Lutheran pastor opposing the Sunday laws of Pennsylvania in 1933 and advocating their repeal, explained his position by saying:

> '. . . My appearance was meant solely to point out the dangers of religious legislation, which is class legislation, and to make clear the position of our church, which has its convictions, but has never tried to force anyone into believing as we do. It is in my humble estimation, a deplorable situation when the churches of Christ who feel that they ought to keep Sunday, try to force everyone else to do the same thing, regardless of their conviction. It is thoroughly un-American. . . .'

'My plea is this: Let us respect each other's convictions. If you are so inclined, try to make your convictions my convictions by persuasion, but let us desist from forcing, coercing, legislating people into our position, if we feel that the gentle art of persuasion yields no results. As for me, I still want to be able to sing "Sweet Land of Liberty", liberty for myself, and even for those who do not happen to agree with me. When the church has to hide behind the skirts of officialdom, it is a sign that the youngster is weak and sick.'

"These views may be taken as representative of a considerable and increasing minority opinion in organized Protestantism."

The following is from EGGLESTON, THE TRANSIT OF CIVILIZATION, FROM ENGLAND TO AMERICA IN THE SEVENTEENTH CENTURY (Beacon Ed., 1959), pp. 160-164:

". . . Ecclesiastical and governmental interference helped to make a painfully rigorous repose on Sunday a distinctive badge of Puritanism. The Sabbath in the superlative degree crossed the high seas with the Puritan migration. In New England it was argued that, as the Sabbath was the principal outward means of honoring God, it stood for the whole duty of man toward God. And a right divine reverence was paid to it. Contrary to English custom, the greatest Puritan divines, Cotton and Hooker, maintained with consistent literalness that the consecrated time began at sunset on Saturday evening, because the Jewish Sabbath began on Friday, and the evening and the morning made a day in the first chapter of Genesis. Judaism sat hard on the Puritan conscience in many ways; even the Jewish preparation for the Sabbath was imposed on the people in the first years of New England. 'All that

inhabit the Plantation' were ordered, in 1629, 'to 'surcease their labors every Saturday throughout the year at three o'clock.' The rest of the day was given to catechising and other painful preparations of the soul for the irksome austerities of the Sabbath. . . . In solemn awe of the Sabbath the innocent gambols of the children were repressed as something particularly heinous. 'We should rest from labor, much more from play', says Cotton in a catechism ludicrously entitled Milk for Babes. The aged Increase Mather, as late as 1712, urged that children must not be suffered to play on the Lord's Day. Of rest the Puritan mind had no conception; it was a technical term that included the attending to public prayers, stretching sometimes to a full hour in length, and to sermons of yet greater prolixity, interspersed with home exercises to fill up the time and banish repose. The leaders were generally sincere enthusiasts bent on pleasing God and not even comprehending what a huge burden of unbearable Pharisaism they were binding on the backs of men. Probably nothing else in Puritanism, not even its hatred of heretics and its horror of witches, caused so much human unhappiness in the aggregate as did its effort to transform the Christian Sunday into a punctilious Hebrew Sabbath. For the attainment of this end almost every sort of outrage on personal liberty was perpetrated by the magistrates and by domestic authority. Even foreigners presumably ignorant of the law were liable to arrest and other indignities, if caught strolling in the streets of Boston on Saturday evening after sunset. Ambassadors from a French Catholic colony were shut into Winthrop's house the entire Sunday for fear of collision with public opinion and the constables. This polite incarceration was mitigated by 'the liberty of a private walk in the garden'. . . .

"The yoke of bondage enforced by law galled the necks of those who were less religious who held to the easier habits of the Church of England. . . . Later in the century there was a party that denied the right of the colonial government to enforce the Sabbath and prescribe modes of worship. An election sermon was leveled at this uprising, and the Synod of 1679 even shakes at it the old superstition used by Dr. Bownd in 1595, and later in the Practice of Piety, that conflagrations are intimately connected with lax Sabbath observance. And indeed the New England Sabbath, though almost too much for flesh and blood, had by this time become a fixed tradition, good for yet more than a hundred years of survival before it should begin to show signs of decline. In 1740 we find it still the custom to shut the gates of the Boston peninsula and to put a guard at the ferry, that no one might go forth on Sunday. And the traveler who gives us this account of the stage of siege in which Boston put itself once a week adds that if 'they could escape out of the town, it wouldn't answer their end; for the same care is taken, all the country over, to prevent travelling on Sundays . . . They will not suffer any one to walk down to the water side, though some of the houses are adjoining to the several wharfs, nor even in the hottest days of summer will they admit any one to take the air on the Common. . . . The justices, attended with a posse of constables, go about every week to compel obedience to this law.' Even a group of two or three might not talk together in the street on Sunday. . . ."

APPENDIX C.

Injustices Committed Against Seventh-Day Adventists by the Sunday Blue Law of Pennsylvania.

1. *Seventh-day Adventists regard the Pennsylvania Sunday blue law as unjust.* Many thousands of devout members of the Seventh-day Adventist Church, the Seventh Day Baptist Church, and other Christian groups,—as well as the pious members of different Jewish congregations—rest and worship God on the seventh day of the week in accordance with the divine law as they understand it.

The Sunday law requires these people to refrain from engaging in decent and honorable labor in the pursuit of their livelihood on Sunday even after they have scrupulously rested on the preceding day for valid religious reasons. Compliance with the demands of the blue law thus causes them to forfeit and lose one-sixth—or nearly 17% of their weekly income. Failure to comply with the law by resting also on Sunday subjects them to penalties of fines, imprisonment, or both. Therefore, they are penalized if they *do* and penalized if they *do not* obey the Sunday law.

2. *The Pennsylvania Sunday blue law is illogical and absurd.* It makes acts that are not criminal or evil in themselves a crime. If common labor that is decent and honorable in itself is to be regarded as lawful on six days of the week, there is no reason why it is to be regarded as unlawful on the first day of the week, except it be a religious reason. Acts that are *per se*, immoral or criminal in nature ought to be prohibited every day of the week, and not made lawful six times as often as they are made unlawful.

3. *The Pennsylvania Sunday blue law is definitely discriminatory in the matter of religion.* It imposes no such unjust conditions upon the religious people of the state who

keep the first day of the week as their day of rest and worship, but is designed to permit them to engage in decent and honorable labor in the pursuit of their livelihood six days a week, including the seventh-day Sabbath. Would they not vigorously protest if they were denied the right to work on Saturday and thus forced to lose one-sixth—or nearly 17% of their weekly income even though they observe Sunday for rest and religious purposes? Is not the right of the Sabbatarian to work six days and earn six days' income as sacred as the right of the Sunday-observing Christian to do the same? Do not the families of the Sabbatarians need shelter, food, clothes, and the other necessities of life as much as do those of Sunday keepers? Why then should a law-abiding resident of this state be reduced by law to the status of a second class citizen simply because of his religious convictions?

4. *The Pennsylvania Sunday blue law would have individual conscience surrender to state control in religious matters, and sets a precedent for further religious legislation.* If the state has the right to meddle in religious matters, and to use the police power to favor and abet one religious segment of its population, by telling everyone upon what day of the week he must rest, and how he shall keep it, what will stop it from pursuing such a policy in regard to other religious matters? It could dictate which version of the Holy Scriptures should be used—whether the Roman Catholic text, which includes the Apocrypha; the Protestant text, which omits the Apocrypha; or the Jewish text, which omits both the Apocrypha and the New Testament. And it could likewise make no exceptions to the rule in these and other religious matters in so far as dissidents are concerned, just as it has made no exceptions in the Sunday blue law for those people who keep the seventh day as the Sabbath.

5. *The Pennsylvania Sunday blue law is dangerous because it places in the hands of religious zealots a weapon*

for their use against people who do not conform to their particular religious belief in regard to Sabbath observance. It affords opportunity for the Sunday-keeping religious zealot to spy on his fellow citizens who keep the seventh day of the week for religious purposes and rest, and to have them fined, imprisoned, or both if they catch them working on Sunday. Seventh-day Adventists know by experience what such persecution means. See AMERICAN STATE PAPERS, pages 457-506. (*American State Papers and Related Documents on Freedom in Religion*, Published in 1949 by the Review and Herald Publishing Assoc., Takoma Park, Maryland. Fourth Revised Edition.) (First edition compiled by William Addison Blakely of the Chicago Bar.)

6. *The Pennsylvania Sunday blue law is definitely un-Christian.* A fundamental principle of Christianity, as stated by its founder himself is this: "Thou shalt love thy neighbor as thyself." Matthew 22:39; Mark 12:31; Luke 10:27; Romans 12:9; Galatians 5:14; James 2:8. The Sunday-keeping proponents of the Pennsylvania Sunday blue law do not by this piece of religious legislation treat their neighbors who keep another day of the week than Sunday as the Sabbath as they do themselves. They reserve for themselves the right to work six days in the week and to rest on the particular day of their choice, while they refuse to allow their Christian and Jewish neighbors who observe another day of the week than Sunday to have the same religious freedom.

7. *The Pennsylvania Sunday blue law is un-American in its application to those citizens who observe another day of the week than Sunday.* When the American people rose up and broke the shackles that bound them under the colonial system, they vigorously declared to all the world: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, *liberty*, and the pursuit of happiness."—*The Declaration of Inde-*

pendence. Religious "liberty" is a precious freedom which the people of the United States have long enjoyed, while people in some other lands have been forced to live under systems of tyranny. Sunday legislation is a carry-over from the colonial period when religion was prominent in politics. It is un-American in that it assures to one segment of the religious population of the state the God-given right to work six days and rest on the day of their choice for religious reasons, while at the same time it denies this right to Seventh-day Adventists, Seventh Day Baptists, and Jews. The Pennsylvania law compels the latter to rest two days and work only five if they would worship God on the Sabbath day of their choice. That sort of legislation, we repeat, is un-American. By making no exemption for those who keep another day of the week than Sunday as the Sabbath day, the Pennsylvania Sunday blue law cannot rightly be called truly American legislation, because it guarantees to one segment of the state's religious population religious liberty that it denies to another.

8. *The Pennsylvania Sunday blue law manifests the spirit of the religious bully.* The Sunday-keeping proponents of this piece of religious legislation virtually say to their fellow citizens who observe the seventh day of the week as the Sabbath: "We are bigger than you are, for we outnumber you in this state. And inasmuch as we are more numerous and powerful than you, and can thus control the police power of the state, we are going to rest on Sunday and then work the remaining six days of the week as we please. But we are not going to let you Sabbath keepers enjoy similar rights so long as we can prevent it. We will forbid you to work on our day of religious rest, but we will labor on yours. You must work only five days in the week if you wish to keep your seventh-day Sabbath, for we are going to compel you to abstain from work on our religious rest-day, commonly called Sunday. If we catch you working on our day of rest and worship we will fine you, imprison you, or both."

9. *The Pennsylvania Sunday blue law is contrary to the pattern of a free society.* The American way of life gives primary value to the dignity and worth of the individual. In America we believe man is endowed by his Creator with inalienable rights of liberty of mind and soul. We believe in the freedom of a mature person to determine his own religious practices, and to assume his responsibilities as a free member of the American society. These values are on trial today. Totalitarian leaders of state and of church around the world have repudiated them. America must never abandon her precious boon of civil and religious liberty. If she does, she will cease to exist as a free nation. True progress can be achieved only on a basis of the recognition of human rights.

10. *The Pennsylvania Sunday blue law ignores the rights of religious minorities.* Governor George D. Clyde, of Utah, in his message to the Utah State Senate outlined his reasons for vetoing the state's controversial Sunday closing bill in February of 1959. He said: "The true democratic process rests as much on the principle of respect for the fundamental rights of minorities as on that of majority rule."

"So long as our constitution remains in force," declared former President Calvin Coolidge, "no majority, no matter how large, can deprive the individual of the right of life, liberty, or property, or prohibit the free exercise of religion or the freedom of speech or of the press." The fullest possible protection of the minority and the security of the majority from the domination of a powerful and entrenched minority are essential elements of American freedom. In matters of religion, neither the religious beliefs of the majority nor of the minority should become the law of the land.

11. *The Pennsylvania Sunday blue law adds confusion and conflict in a pluralistic culture.* In America's culture, varieties are legion. Interrelationships between the vari-

ous churches and religions, and between the religious and non-religious, require mutual recognition of the wide variations of viewpoints, and a charitable attitude toward those who differ. Harmonious adjustment cannot be maintained by legislating the sectional interests of certain segments of society regardless of their numerical strength, or their majority or minority status. Absolute freedom of conscience is essential to the spirit of brotherhood.

12. *The Pennsylvania Sunday blue law is religious legislation.* The observance of Sunday as a holiday is, both in its origin and its history, a religious institution. In the early centuries of the Christian era it was made an ecclesiastical festival commemorating the resurrection of Christ on the first day of the week. When Constantine the Great, emperor of the Roman Empire, professed conversion from paganism to Christianity in the early part of the fourth century, he launched a program for the uniting of church and state, and in doing so he issued the first civil Sunday blue laws—at least six of them—which became the precedent for all future Sunday legislation by civil governments.

In fact, the very custom of resting one day in seven is historically a religious practice. It is not the creation of any civil power. The practice originated when God—after creating the world in six days, as described in Genesis 1,—rested on the seventh day, blessed it, and sanctified it (set it apart for holy use). Genesis 2:2,3; Exodus 20:11; 31:17; Hebrews 4:4.

Controversy has raged for centuries in the ranks of Christendom in regard to which day of the week should be kept for religious purposes and rest. A large segment of the Christian population today alleges that Sunday should be kept as a sacred day because Christ rose from the grave on the first day of the week. Mark 16:9. But other Christians conscientiously believe that Christ was the Creator of the world (John 1:1-3, 10, 14; Ephesians 3:9; Colossians 1:13-17; Hebrews 1:1, 2), and was therefore the Divine One

who rested on the seventh day, and blessed and sanctified it. Hence He had valid reason for declaring: "The Son of Man is Lord also of the Sabbath day." Matthew 12:8; Mark 2:28; Luke 6:5. The seventh-day Sabbath is the only day of which He declared Himself to be the Lord. It is the true Lord's day, for "the seventh day is the Sabbath of the Lord thy God." Exodus 20:10.

Christ Himself was a Sabbathkeeper (Luke 4:16), and His disciples observed it with Him (Mark 1:19-20). There was never any disagreement between Him and His Jewish opponents in regard to which day of the week should be kept as the Sabbath. They both kept the same seventh day of the week as sacred, but they differed greatly as to the manner in which it should be kept.

Christ declared that He did not come to do away with the divine law, but insisted that it was as enduring as the ground beneath our feet and the sky above our head. Matthew 5:17-19; Luke 16:17. Hence He commanded His followers to make the Sabbath a matter of prayer during those trying times that would lay ahead when Jerusalem would be destroyed, that they might not have to flee on the Sabbath. Matthew 24:20. When their Saviour died on that memorable Friday of long ago, it was referred to by His followers as "the preparation, that is, the day before the Sabbath." Mark 15:42. "That day was the preparation, and the Sabbath drew on." Luke 23:54. And when they had given His body burial, "they returned, and prepared spices and ointments; and *rested the Sabbath day, according to the commandment.*" Luke 23:56. "And *when the Sabbath was past*, Mary Magdalene, and Mary the mother of James and Salome, had bought sweet spices, that they might come and anoint Him. And very early in the morning, the first day of the week, they came to the sepulcher at the rising of the sun." Mark 16:1,2. "And they entered in, and found not the body of the Lord Jesus." Luke 24:3. The reason for this is that "Jesus was risen early the first day of the week." Mark 16:9. Thus the Sabbath, accord-

ing to the Scriptures is the day before the first day of the week.

However, neither Christ nor His apostles ever declared in the Scriptures that the first day of the week is holy, is a day of rest, is blessed, is the Sabbath, or is the Lord's day. Not even once do they declare it to be a sin to work on the first day of the week, or that the Sabbath has been transferred from the seventh to the first day of the week, or that the first day of the week should be observed by Christians in commemoration of the Lord's resurrection from the dead. No commandment is given by them to observe Sunday as a weekly holy day in any manner.

No other valid reason can be given in Sunday legislation for decreeing that Sunday should be kept as a day of rest except the fact that a large segment of the religious poulation regards it as a holy day. Sunday blue law legislation is, therefore, meddling on the part of the state in a religious controversy in favor of Sunday-keeping Christians and by discriminating against Sabbath-keeping Christians and Jews.

Christ declared when He was interviewed concerning the Christian's duty to the state: "Render therefore to Caesar the things that are Caesar's and to God the things that are God's." Matthew 22:21. Caesar has no claim upon God's rest day for man for "the seventh day is the Sabbath *of the Lord thy God*"—*not of the state*. Exodus 20:10. He calls it "My holy day." Isaiah 58:13. Christ said of Himself: "The Son of Man is Lord even of the Sabbath." Matthew 12:8; Mark 2:28; Luke 6:5. The state (Caesar) has no just jurisdiction over God's holy day, the day that He has appointed for religious rest, for He has declared that it belongs to Him. Therefore, the observance of the day of religious rest in *an obligation* that the *citizen owes solely to God*, and the state should not attempt to dictate to him what particular day of the week that should be or how he should observe it.

The state has not been appointed by God to decide by law what day of the week men should keep, or how they should keep it. Benjamin Franklin, one of the fathers of our country and one of the greatest citizens that the United States and Pennsylvania ever had, has well stated the case in these words:

> "When a religion is good, I conceive that it will support itself, and, when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one."—Letter to Dr. Price, October 9, 1780, in the *Writings of Benjamin Franklin*, edited by Albert Henry Smith, Vol. 8, p. 154.

Seventh-day Adventists ask no special favors for themselves in this controversy over the Sabbath question, for they believe and know that religious truth can defend itself in an open and fair contest. All that they ask in this matter is to be treated with equity and justice, and that the state give freedom for all and special favor and protection for none. Since the observance of one day in seven for sacred purposes and rest involves a religious duty that the citizen owes solely to God, and not the state, they believe that every man should be left free to decide for himself which day he shall rest upon as holy to God, and how he shall keep it unto Him. They believe that since the observance of a weekly day of rest is a matter conscience and religious conviction, it should be left to each of the various religious groups to settle the question for itself. Despite the fact that the world at large spends the seventh day of the week in the hustle and bustle of commerce and industry, Seventh-day Adventists have been able to worship quietly in their churches and to carry on their work successfully and to increase in numbers, by resorting only to the teachings of God's Holy Book and persuasive power of the love of the gospel of Christ in promoting their beliefs. They have not

asked that the police power of the state be used to force men to rest on the seventh-day Sabbath, and would recommend this eloquent silence to other religious people whose home is America. Certainly if this small denomination can do that, there is no reason why the larger ones that rest on Sunday should resort to the police power of the state in order to meet the competition that they face on Sunday in a free country where every man is protected in his right to determine for himself what day of the week God would have him observe as the day of rest. But as long as the Pennsylvania Sunday blue law provides no exception for the people who rest on another day of the week than Sunday as the Sabbath day, it cannot be said that all the citizens of this great state equally enjoy the boon of religious liberty.

All that Seventh-day Adventists ask is the privilege of enjoying their American citizenship without economic discrimination, nor a second-class status being forced upon them because they observe another day of the week than Sunday as their day of rest.

MELVIN W. ADAMS,
Associate Secretary
Department of Public Affairs,
General Conference of Seventh-day Adventists.

(See, for an excellent collection of papers on this subject, the Seventh-day Adventist volume, AMERICAN STATE PAPERS ON FREEDOM IN RELIGION (3rd Ed., 1943)).

APPENDIX D.

IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY, PENNSYLVANIA

No.

TERM, 1960

COMMONWEALTH OF PENNSYLVANIA

v.

ANNE CAVALERRO, 1726 SOUTH 11TH STREET, PHILADELPHIA, PENNSYLVANIA

Miscellaneous Division

No.

TERM, 1960

COMMONWEALTH OF PENNSYLVANIA

v.

MORRIS LEVENSTON, 908 SOUTH 58TH STREET, PHILADELPHIA, PENNSYLVANIA.

OPINION AND JUDGMENT.

April 20, 1960. ALEXANDER, *J.*

I.

Petitioner Anne Cavalerro seeks the allowance of an appeal from her conviction before a Magistrate for selling a lady's slip on Sunday, allegedly in violation of the Act of

August 10, 1959, P. L. 212, 18 Purd. Stat. § 4699.10.[1] Morris Levenston appeals from a similar conviction for selling on Sunday, although he actually was not selling, but was merely the manager of the store. Both were employed at Bargain City stores located in Philadelphia. The fines assessed are small, but the issues posed by the petitions are large, and deserve full and thorough consideration.[2]

For three and a half centuries, the people of America have expressed, at first in their colonial Charters and Compacts, and for the last 200 years in our Constitutions, their finest ideals of political life, ideals which I believe will represent to future civilizations the unique contribution of America to mankind, a contribution beside which our technical advancement may be lost in the sands of time.

No principle of government is more inextricably woven into our Constitutional fabric than these: that the law shall not discriminate between man and man, and that Caesar shall not meddle with that which is God's.

We here in Pennsylvania have sought to assure unto ourselves these great rights by Article 3, Section 7 of the

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1. Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof. "Each separate sale or offer to sell shall constitute a separate offense . . ." (P. L. No. 212, 18 Purd. Stat. § 4699.10)

2. Cf. *Thompson v. Louisville*, (the so-called "shuffling case") Oct. Term, 1959, No. 59, where the Supreme Court of the United States on March 21, 1960, in a unanimous opinion, reversed convictions for disorderly conduct on which the defendant had been fined $20.00. 28 U. S. Law Week 4193, 5.

Constitution of 1874 reading, to the extent pertinent herein that:

> "The General Assembly shall not pass any local or special law: . . . Regulating labor, trade, mining or manufacturing . . .,"

and by Article 1, Section 3 of the present Constitution, identical with the Constitutions of 1790 and 1838:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and *no preference shall ever be given by law to any religious establishments or modes of worship.*"

But, being human, we err. The temptations of the day, like Circe, understandably lure our lawmakers. And, as in the Odyssey of Homer, Penelope seemed far away from her lord, Odysseus, yet there he was standing before her. The Constitution seems far away. Yet, to the judge, like a pricking conscience, falls the task of leading us back into the path of constitutionality, to maintain like the watchmen in the night, the eternal vigilance which is liberty's price.

Petitioners contend that the Sunday law contravenes both constitutional provisions set out above and also their counterparts in the Federal Constitution, the Fourteenth Amendment, into which now has been incorporated the religious guarantees of the First Amendment.[3]

The Commonwealth argues that here, as is the case generally in issues of constitutionality, the law is presumed to be valid and the burden of persuasion is upon the party attacking it. Petitioners cite respectable authority for the

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3. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), reversing 149 Pa. Super. 175.

view that the burden, in the areas of personal liberty including religion and free speech, is upon the Commonwealth to persuade us that the interference is reasonable and free of constitutional infirmity.[4] With this view we agree although we do not deem it necessary to decide this issue because it is our opinion that the Sunday law is unconstitutional, regardless of which party has the burden of persuasion.

II.

Let it be assumed first that the Law is, as the Commonwealth urges, civil or economic, and not relgious, legislation.

Chief Justice Horace Stern a few years ago, writing for a unanimous Supreme Court, stated:

> ". . . By a host of authorities, Federal and State alike, it has been held that a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and *the means which it employs must have a real and substantial relation to the objects sought to be attained.* Under the guise of protecting the public interests *the legislature may not arbitrarily interfere with private business* or impose unusual and unnecessary restrictions upon lawful occupations. . . ."[5]

And, as the Court said in *Kurtz v. Pittsburgh*, 346 Pa. 362, 368 (1943):

> "The basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction between the members of the class and the general public, and based upon 'a necessity springing from manifest peculiarities, clearly distin-

4. *United States v. Carolene Products Co.*, 304 U. S. 144, 152 fn. 4 (1938); *Murdock v. Pennsylvania*, supra; *Thomas v. Collins*, 323 U. S. 516 (1945).

5. *Gambone v. Commonwealth*, 375 Pa. 547, 551 (1954).

guishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others.'"

See also *Læplacca v. Philadelphia Rapid Transit Company*, 265 Pa. 304, 308 (1919).

The Supreme Court of the United States has stated the rule as follows:

"'. . . . Classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, but the object of the classification must be for the accomplishment of a purpose or the promotion of a policy which is within the permissible functions of the state, and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.'' *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 406 (1928).

How does the Sunday law square with these requirements? I can discern no real or substantial relation between this legislation and any object constitutionally within the power of the Legislature to achieve in the realm of civic or economic legislation.

The law prohibits the sale on one day of the week of commodities in general use, the sale of which has never been generally prohibited and indeed could not be, because in most instances they are necessities of life, viz: clothing, furniture and the like. What conceivable purpose can such a law have? Nothing in the nature of the commodity itself requires that its sale be subjected to regulation. By way of illustration, it is not a narcotic, to be restricted to sale upon prescription. It is not alcohol, to be sold only to

adults. It is not milk, to be sold only upon compliance with sanitary requirements. In short, there is nothing intrinsic in the nature of the items covered by the Sunday law which affords any rational, non-religious reason for prohibiting their sale on Sunday, as against any other day.

What, then, is it about Sunday that can sustain the legislation? We pass for the moment the religious implication of the day, because if the law has a religious purpose, then, as pointed out below, it would be unconstitutional for that reason.

The Commonwealth contends that the Sunday law is appropriate in order to assure a day of rest, that at least one day's rest in seven is a proper health or welfare measure, and that Sunday may be selected as that day because of the difficulty of enforcing a rest law which does not designate a single day upon which all citizens must refrain from work and rest. We may assume all this to be valid, although I doubt that it is,[6] but it does not save this law because the instant classification is arbitrary. I do not

6. For several reasons: (a) Pennsylvania, like the Federal government and other states, has enacted a series of genuine labor laws covering comprehensively this subject. See, e.g., Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 Purd. Stat. § 103(a) (Women cannot work more then six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 Purd. Stat. § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 Purd. Stat. § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 Purd. Stat. § 481 (employees of motion picture theatres must be given one day of rest per week). (b) Many states (Arizona, California, Oregon, Wisconsin and Wyoming) have one-day-in-seven rest laws (See Sunday Laws, 25 S. Calif. L. Rev. 131, 134) and I know of no problem in connection with their enforcement, or with the enforcement of the labor laws referred to in (a) above. Indeed, such laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday laws is common knowledge, and tends to bring law enforcement generally into disrepute. (c) Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it. See, e.g., *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949).

predicate this conclusion upon the exclusion from the law of persons making wholesale sales and indeed, persons engaged in all other industrial or commercial activities generally, although I can ascertain no reason why they are in less need of rest than retail sales people. However, such distinctions, whatever they may lack in common sense, at least have the imprimatur of tradition, albeit in other contexts.[7]

This law forbids a clerk to sell to my blind neighbor a Dylan Thomas *recording*, but does not prohibit the same clerk from selling me a *book* containing exactly the same poems from the next counter. Side by side in Bargain City and many other stores are *tricycles*, which cannot be sold to me for my two-year-old granddaughter because they are toys, and adult bicycles which I can buy for myself or for my daughter just out of her teens. A clerk may sell me seat covers for my automobile, but he cannot sell me slip covers for my sofa. If I have forgotten to shop for a birthday present for my wife during the week, the same store may sell me on Sunday without violating this law a camera, ice skates or a dozen roses, but not a watch or a suitcase or a tie pin for myself. It cannot sell me a *toy* rubber football for the four-year-old; but this law does not prohibit the sale of a football for the teenager, for one is a *toy* and the other is not, and *sporting goods* are not covered by this law.

These examples could be multiplied endlessly by anyone strolling through Bargin City, a department store or a drug store with a copy of the law in his hand and the law must be kept in hand or exacty memorized, because there is no intelligible logical principle by which one may determine what is excluded and what is included.

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7. It was argued by counsel for the petitioners and not denied that some of the corporate interests supporting the "rest" law now at issue at the same time were attempting to get the Pennsylvania Legislature to enact a law permitting bartenders to work in hotels on Sunday. It would seem to me that an overworked or tired bartender would do himself and his customers much more harm than a tired girl clerk selling slips as here complained of.

The 2-1 decision of the three-judge court in *Two Guys From Harrison, Inc. v. McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), now on appeal to the Supreme Court of the United States, Oct. Term, 1959, No. 699 does not require a different result, for many reasons. In the first place, that court did not inquire into the Pennsylvania Constitution, which we consider here. Second, I believe it is implicit in the *Two Guys* opinion that the Court there felt constrained to decide as it did, not because it was persuaded logically that the classification was reasonable (indeed the Court indicated that it was whimsical), but because it felt constrained so to do by *Friedman v. New York*, 341 U. S. 907 (1951), a decision which has no application to the Pennsylvania Constitution. Third, equally distinguished federal judges, former Chief Judge Magruder, my own former teacher, for whom I have the most profound regard, and Chief Judge Woodbury, by reasoning which I find more realistic, decided to the contrary. *Crown Kosher Super Market of Massachusetts v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), now on appeal to the Supreme Court of the United States, Oct. Term, 1959, No. 532. Both the *Two Guys* and the *Crown Kosher* cases now await the consideration of the Supreme Court of the United States. Finally, the Pennsylvania Supreme Court has also recently had occasion to indicate that the *Two Guys* decision, while entitled to great respect, does not foreclose a nisi prius court, which this is, from arriving at its own independent decision. *Rubin v. Bailey*, 398 Pa. 271 (1960).[8]

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8. The final decision of the Montgomery County Court in the *Rubin* case is, of course, not determinative here. That was an equity suit and the principal ground for decision was that the plaintiff did not come into court with clean hands. Such defense is not available to the Commonwealth in this criminal suit. With regard to the constitutionality of the Act, the Court's opinion disposes of the problem in one paragraph without discussion, simply citing the *Two Guys* case which has been discussed at length above.

The Court did not state that the Pennsylvania Act was not unconstitutional. It merely stated that in an equity proceeding where the plaintiff was seeking injunctive relief against the enforcement of a

I conceive it to be the duty of any judge, met with a constitutional issue in this sensitive area, to apply the law as he conscientiously sees it unless constrained otherwise by a binding precedent of a superior court. However pious the purpose of the law, it must still meet the test of reason, and a distinction which a judge would not tolerate as reasonable or rational on Monday does not become so on Sunday. Judge Voelker, whose literary skill exceeds mine, as 61 weeks on the best seller list attests,[9] has put it better than I can in *Peoples Appliance and Furniture, Inc. v. City of Flint, Michigan*, —, 99 N. W. 2d 522, 530 (1959):

> "... there exists a curious and rather widespread judicial reticence when our courts are dealing with so-called Sunday ordinances. The judicial approach then often seems to become gingerly to the point of timidity, as though the fact that, however invalid such ordinances may be when judged by ordinary standards, after all most Sunday ordinances are plainly on the side of morality and all right-thinking people and, if they should err, they do so on the side of the angels. If such a tendency exists (and we trust we are wrong), we can only observe that an unreasonably discriminatory or otherwise invalid ordinance is no less bad because it happens also to please the pious. It is bad enough that Sunday ordinances should ever unreasonably discriminate between our people; it is doubly bad should there ever be any hint of judicial discrimination in their interpretation as against the accepted rules of interpretation applying to ordinary ordinances. Yet this apparent double standard is particularly evident in Michigan, as I shall presently undertake to demon-

criminal statute that the plaintiff would prevail only if he could show that the statute was "so unconstitutional on its face as to bring the plaintiffs within the ruling of" *Duquesne Light v. St. Clair*, 377 Pa. 323 (1954). This, of course, is not the rule in a criminal suit as here.

9. Author of *Anatomy of a Murder*, under the nom de plume Robert Traver.

strate. One had not heretofore been sufficiently aware of the fact that in Michigan there are evidently Sunday standards for judging Sunday ordinances. I am now aware and I do not like what I see."

The decisions on this issue of classification in other states are divided, with the majority sustaining the classifications there involved. See the cases collected in 20 A. L. R. 1117, 98 A. L. R. 1093, 126 A. L. R. 743. However, I prefer the reasoning in such cases as *City of Mt. Vernon v. Julian*, 369 Ill. 447, 17 N. E. 2d 52 (1938); *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N. W. 2d 643 (1951); *Gronlund v. Salt Lake City*, 194 P. 2d 464 (Utah, 1948); *Allen v. Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1938); *Gaetano Bocci & Sons Co. v. Town of Lawndale*, 208 Calif. 720, 284 Pac. 654 (1930); *Deese v. City of Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939 (1943); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952). It is more realistic, more candid, more logical. It certainly accords more with the spirit and rationale of the long line of Pennsylvania decisions which have considered the constitutionality of business legislation.[10]

The general application of the Act of 1794, 3 Sm. L. 177, 18 Purd. Stat. § 4699.4, does not save the 1959 Sunday Law. The penalty under the early law is radically different, a $4.00 fine for an entire Sunday's business as against $100.00 for the first sale or offer to sell and $200.00 for *each* subsequent sale or offer, plus much longer imprisonment in default of payment of the fine. It does not provide for equal treatment in fact or law as between the sales or offers to sell included in the 1959 Law and those excluded there-

10. See *Commonwealth ex rel. Woodside v. Sun Ray Drug Co.*, 383 Pa. 1 (1955); *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25 (1948); *Commonwealth v. Stone*, 191 Pa. Super. 117 (1959).

from.[11] Nor do the decisions under that law,[12] which is of relatively general application, apply here where the discrimination is so marked and so unjustifiable between one commodity and another of virtually the same properties sold under the same conditions.

Having reached the conclusion at this point that this particular Sunday law is unconstitutional because of its classifications and because it is without real or substantial relation to any object which the Legislature may constitutionally seek to attain, this opinion might properly conclude. However, it is not unlikely that appellate review may be sought of this decision because of the public importance of the issues at stake. Accordingly, I think it appropriate to discuss the other principal question before me, namely whether the law violates the constitutional prohibition against religious legislation.

The ground upon which the Pennsylvania Supreme Court for many years predicated its decisions that Sunday laws were constitutional, namely that "Christianity is part of the common law of Pennsylvania . . . Sunday is the holy day among Christians",[13] is the very reason why these laws would now have to be held unconstitutional. Neither Christianity nor any other religion is part, nor can constitutionally be part, of the law of this Commonwealth. Neither Sunday nor Saturday nor Friday nor any other day, however holy it may be among the adherents of one religion or other, is a holy day or can constitutionally be a holy day within the eyes of the law. The Pennsylvania

11. The subsequent exemptions from the Act of 1794 (e.g., Act of July 2, 1935, P. L. 599, 4 Purd. Stat. §§ 59-65; Act of April 25, 1933, P. L. 74, 4 Purd. Stat. §§ 81-87), to the extent they have any application here, would only accentuate the unequal legislative restraint upon the present petitioners.

12. E.g. *Commonwealth v. Baader*, 188 Pa. Super. 424 (1958), allocatur refused, 188 Pa. Super. xxviii (1959).

13. *Commonwealth v. American Baseball Club of Phila.*, 290 Pa. 136, 143 (1927); *Commonwealth v. Hoover*, 25 Pa. Super. 133, 139 (1904); *Sparhawk v. Union Passenger Railway Co.*, 54 Pa. 401, 408-409 (1867).

Legislature cannot sanctify or honor or compel observance or respect for any such day, or the religious tenets it commemorates.

There is in the record of this case, for the first time in any case I have found, explicit and uncontradicted testimony by expert witnesses [14] that Sunday is the Lord's Day among Christians, that it commemorates the Resurrection of Jesus just as does Easter, that to accept Sunday as a holy day is to accept the Divinity of Jesus, that to be *compelled* by law to refrain from work on Sunday is to be *compelled* by law to show respect for and to honor the Resurrection and the doctrine of the Divinity of Jesus.[15]

(The writer might say parenthetically, that having written this opinion during most of the Holy Week and concluding it today, Saturday before Easter (with time out for religious observance), never have I been more impressed with the sentiments expressed by the Supreme Court of Ohio, in refuting the contention that "Christianity is a part of the common law of this country" in its reply ". . . True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness. . . . A form of religion that cannot live under equal and impartial laws ought to die, and sooner or later must die." (*Minor v. Board of Education of Cincinnati*, infra, N. 17.))

Refraining from work, under compulsion of law, is a compulsory form or symbol of respect, like kneeling or

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14. This testimony was given by Dr. Sidney B. Hoenig, an ordained Rabbi and Professor of History at Yeshiva University, and Elder Robert L. Odom, an editor and historian of the Seventh Day Adventist Church.

15. See Statement of William Lloyd Garrison in *Stokes, Church and State in the United States*, Vol. III, pp. 154-169; *Mark, The Faith of our Fathers*, p. 286; *Fisher, History of the Institution of the Sabbath Day*, pp. 63-66.

standing or covering or uncovering the head.[16] This is offensive, according to the expert witnesses, to Seventh Day Christian Sabbatarians and to Jews, and I believe to persons of religious faiths other than the Christian, to atheists, agnostics and even to those devout Christians who feel that religion is a matter for one's own conscience, uncoerced by any secular authority.[17]

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16. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at pp. 632-633, 642, the Court said:

"There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, functions, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

17. See *Minor v. Board of Education of Cincinnati*, 23 Ohio St. Rep. 245-247:

"'We are told that this word 'religion' must mean 'Christian religion', because 'Christianity is a part of the common law of this country', lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a law of the state,

There has been no opinion of the United States Supreme Court on this issue since *Hennington v. Georgia*, 163 U. S. 299 (which incidentally was decided under the Commerce Clause), in 1896, the same year that the Supreme Court decided that stain on our constitutional history, *Plessey v. Ferguson*, 163 U. S. 537, so dramatically reversed in 1954 by *Brown v. Topeka*, 347 U. S. 483, where for the first time evidence was introduced showing that *Plessey* was based upon a wrong premise in fact. I believe the evidence introduced in this case and referred to above shows that *Hennington v. Georgia* likewise is grounded on an erroneous view of the facts. It is time, in view of the present complete

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like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. 'No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do not attempt to enforce Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they are the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion 'without partiality', and therefore a religion 'without hypocrisy'. True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. Armed with these, and these alone, it is not afraid nor 'ashamed' to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or 'ashamed' is, that it is not the 'power of man', but 'the power of God', on which it depends. True Christianity never shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that can not live under equal and impartial laws ought to die, and sooner or later must die."

record in this case that this issue should be determined. A delay should not be experienced as was the case of correcting the evil effects resulting from the *Plessey v. Ferguson* decision (supra). Legal writers have, since the *Brown v. Topeka* decision (supra) of May 17, 1954, frequently written of the great delay in the progress of the Negro in his educational, political and cultural advance in America because of the erroneous interpretation of the facts which resulted in the 1896 decision in the *Plessey v. Ferguson* case (supra). A discussion of this subject appears in an article by this writer entitled "The Upgrading of the Negro's Status by Supreme Court Decisions", The Journal of Negro History, Vol. XXX, No. 2, April, 1945.

Similarly, in our own state we find no recent opinion of the Pennsylvania Supreme Court, and none since *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), which reversed the Superior Court of Pennsylvania and decided that the religious clause of the First Amendment to the United States Constitution was applicable to the states through the Fourteenth Amendment.

It is true that a divided Superior Court a few years ago sustained the validity of another Sunday law and that allocatur was refused by the Pennsylvania Supreme Court.[18] However, there was absent from that case the expert testimony to which I have just alluded.

Here, again, as on the classification issue, *Two Guys* is not binding. Viewed afresh, the reasoning of *Crown Kosher* is more compelling. The *Two Guys* opinion proceeds upon the assumption that the Court is foreclosed from recourse to logic and independent judgment by *Friedman v. New York*, supra, even though the Two Guys court found as a *fact* that the law was religious in purpose and effect,[19] a fact not

18. *Commonwealth v. Bauder*, 188 Pa. Super. 424 (1958).

19. The Court in *Two Guys from Harrison v. McGinley* found that there were many persons in Pennsylvania who were offended in their religious beliefs by the required cessation of business on Sunday since it is "an enforced expression of respect for and acknowledgment

present in *Friedman*. There also is authority for the view that affirmance for want of a substantial question, as in *Friedman*, is not a decision on the merits, but is akin more to the refusal of certiorari.[20]

I am convinced that the Sunday law is religious in origin, that its present purpose is basically religious,[21] and that it is religious in effect. It represents the preferment by the Commonwealth of Pennsylvania of the conventional

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of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the Resurrection of Christ." 179 F. Supp. at p. 948. The court there also made the following additonal findings of fact:

"1. Sunday is a day designated for religious services and observances of Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

"2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day."

20. See Frank, United States Supreme Court: 1950-1951, 19 U. of Chi. L. Rev. 165 (1952) at p. 231:

"A word as to the appeals dismissed. Certiorari is a matter of the Supreme Court's discretion, while appeal is a matter of right to the party insofar as it is specifically authorized by Congress; cf. 62 Stat. 928 (1948), 28 U. S. C. A. § 1257 (1949). True, the Supreme Court may dismiss an appeal if it is 'insubstantial,' Zuch v. King, 260 U. S. 174 (1922), and the test of insubstantiality is extremely subjective. If the Court treats truly arguable questions as 'insubstantial,' or if it summarily affirms appeals, it has for all practical purposes obliterated the very difference between certioraris and appeals which Congress meant to preserve. The Court has for some years been in the process of interpreting away the difference between appeals and certioraris, reducing the appeals also to a matter of its own discretion; and it seems probable that within a few years there will be little practical difference between the two methods of review."

See also the Opinion of Justices Black and Douglas in *Linehan v. Waterfront Commission*, 347 U. S. 439 (1954).

21. The manipulation of this religious sentiment by certain commercial groups, whose economic interests happen to coincide therewith, does not destroy the religious nature of the law.

Christian religion and its basic tenets, the Resurrection and Divinity of Jesus, above all others. Petitioners and all persons who want to sell on Sunday cannot constitutionally be prohibited from doing so, under penalty of fine or imprisonment, by a religious law like this.

The Commonwealth cites cases in which it has been held that religious sensibilities must give way to civil legislation under the police power, as in compulsory vaccination and the prohibition of polygamy.[22] However, they do not apply here. Those laws were genuine, bona fide civil laws, motivated entirely by an intent to promote, in this world, the health and welfare of the populace. Religious views at variance therewith may, on occasion, not receive exception from such general laws. This law is not that kind. It is not secular or civil, but religious, just as would be a law prohibiting all persons from eating meat on Friday, or eating pork products (absent contamination), or requiring them to refrain from work on Christmas or Yom Kippur, or to doff their hats when passing a church, or to wear their hats when passing a synagogue, or to listen to Bible reading in the public schools.[23] It is not a civil law, within the power of the Legislature to enact, which happens to call for conduct conflicting with some religious belief, but rather a religious mandate, beyond the power of the Legislature ab initio, whether or not it conflicts with anyone's religious views.

And even in the case of genuine civil legislation, those whose religious views do not permit their compliance may be excused from its scope when a balancing of interests indicates that the public good will not be irreparably injured if the exception is permitted.[24]

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22. *Reynolds v. United States*, 98 U. S. 145 (1878); *United States v. Cleveland*, 329 U. S. 14 (1946).

23. *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (E. D. Pa. 1959).

24. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943).

It is; therefore, my opinion that the Sunday law is void under both the Federal and Pennsylvania Constitutions, because it prefers certain Christian religions over all others and contributes to their establishment.

III.

For the reasons set forth in the foregoing opinion, it is

ORDERED:

That the petitions of Anne Cavalerro and Morris Levenston for allowance of appeal be and they hereby are granted, the convictions are reversed, and judgments of acquittal be and they hereby are entered as to each of said petitioner-defendants.

RAYMOND PACE ALEXANDER, *J.*

APPENDIX E.

IN THE COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY

DECEMBER TERM, 1959

No. 1411

In Equity

BARGAIN CITY U. S. A., INC.,

Plaintiff,

v.

RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA; DONALD WAGNER, MANAGING DIRECTOR OF THE CITY OF PHILADELPHIA; VICTOR BLANC, DISTRICT ATTORNEY OF THE CITY OF PHILADELPHIA; AND THOMAS GIBBONS, POLICE COMMISSIONER OF THE CITY OF PHILADELPHIA,

Defendants.

ADJUDICATION.

DOTY, *J.* June 10, 1960

Plaintiff's complaint in equity avers that plaintiff operates a store at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania, in which it leases space to concessionaires for the sale of merchandise and that, pursuant to the Act of August 10, 1959 (which is an Act prohibiting

the retail sale of certain merchandise on Sunday, popularly known as the New Sunday Blue Law), defendants have caused certain warrants of arrest to be issued against employees of plaintiff and its concessionaires. The complaint also alleges that one of plaintiff's employees has been subjected to the imposition of a fine and costs at a hearing held before a Magistrate in the City of Philadelphia and that defendants have threatened to continue to enforce the Act against plaintiff's store, but have refused to enforce the Act against other persons engaged in business who are in violation of said Act. Plaintiff avers that a substantial portion of its business is derived from its operations on Sundays and that it will suffer substantial and irreparable injury if it is prevented from continuing its Sunday operations.

The complaint further avers that the Act of August 10, 1959, is unconstitutional because it violates various sections of the Constitutions of the United States and of the Commonwealth of Pennsylvania. Plaintiff seeks an injunction against defendants restraining them from arresting or threatening to arrest plaintiff's employees or those of its concessionaires and further prays that this Court declare the Act unconstitutional.

On January 15, 1960, we granted a temporary restraining order which was vacated on January 22, 1960. The matter is now before us for a final disposition after a hearing and the taking of testimony in open court.

The basic facts are not in dispute, and after careful consideration of the pleadings, the testimony and the law in this case, we have come to the conclusion that the plaintiff is entitled to relief, that a permanent injunction shall issue, and we, therefore, make the following:

Findings of Fact.

1. Plaintiff operates a store at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania, where various items of merchandise are sold at retail.

2. Defendants are the Mayor, Managing Director, District Attorney and Police Commissioner of the City of Philadelphia.

3. Plaintiff's store has been opened and operating for some time prior to the passage of the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10.

4. The Act of August 10, 1959, provides that it shall be unlawful to sell or offer to sell at retail on Sunday clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments, and recordings . . . .".

5. Plaintiff operates its store through concessionaires to whom it leases space within the store.

6. Both before and after passage of the Act of August 10, 1959, plaintiff's store has always remained open for retail business seven days a week including Sundays.

7. Enforcement of the Act of August 10, 1959, would compel plaintiff to close its store on Sunday since a large volume of retail business at its store consists of the sale of items forbidden by the Act to be sold at retail on Sunday.

8. The closing of the plaintiff's store on Sunday would result in a loss to plaintiff of approximately $40,000. per year and, as a result thereof, it would be necessary for plaintiff to close the store entirely and discontinue its business at that location. Continued enforcement of the Act of August 10, 1959, will, therefore, result in irreparable damage and injury to the plaintiff.

9. Sunday work at the plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does similar work on any other day of the week.

10. Various religious faiths observe Friday or Saturday as their Sabbath and believe that they are commanded by religious belief to abstain from secular activities on those days while Sunday is not such a day for observance by them. Generally, other members of the Christian faith observe Sunday as their Sabbath but do not consider Friday or Saturday as days for religious observance.

11. Because of the limitation on police personnel available, the Police Commissioner of Philadelphia has assigned a maximum of ten police officers per Sunday to enforce the Act of August 10, 1959, and this number of assigned police officers has not been sufficient to accomplish general enforcement of the law.

12. Because of the limited personnel available for enforcement of the Act, the Police Commissioner has adopted the policy of having the officers assigned to enforce the law make purchases on Sunday at certain large retail stores, one of which is the plaintiff's, and then instituting criminal prosecution against the sellers.

13. Several of the clerks at plaintiff's store have been arrested and fined for selling on Sunday items which the law prohibits being sold at retail on that day.

14. The established policy of the Police Commissioner is that the Act of August 10, 1959, is to be enforced in Philadelphia only against employees of certain large retail establishments.

15. Prior to the Act of August 10, 1959, the maximum penalty which could be imposed for commercial activity on Sunday in violation of the existing Act of June 24, 1939, P. L. 872, sec. 699.4, 18 P. S. 4699.4, was $4.00.

16. The $4.00 penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments.

DISCUSSION.

This case is but one of a number which have arisen in our state courts and federal courts sitting within this Commonwealth challenging the constitutionality of the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10.

Before considering the substantive questions involved, we are met at the outset by defendants' contention that this Court has no equitable jurisdiction in this proceeding. The defendants take the position that the plaintiff has not brought itself within the well recognized rule that equity will entertain jurisdiction to enjoin public officers from proceeding with the enforcement of a penal statute only where the validity of the statute is seriously and substantially challenged and, in addition, it is clearly apparent that irreparable damage and harm would result to the plaintiff if injunctive relief were denied. *Cooper v. McDermott*, 399 Pa. 160 (1960).

The *Cooper* case, *supra*, first decided by this Court and affirmed on appeal, is readily distinguishable from the one at bar. There the plaintiffs had a full, complete and adequate remedy at law in that they could challenge the constitutionality of the act in question by a motion to quash the indictment. Therefore, in that case, no irreparable injury resulted from the Court's refusal to entertain a prayer for equitable relief.[1]

However, it is unquestioned that equity has jurisdiction where there is no adequate remedy at law and that a court of equity can enjoin criminal prosecutions and threatened criminal prosecutions in certain instances. The instant case presents a situation very similar to that which existed in the case of *Kingsley International Pictures Corporation v. Blanc*, 396 Pa. 448 (1959), in which our Supreme Court reversed the lower court's dismissal of a complaint in equity. In that case the Court after setting forth the rule that equity

1. The companion taxpayer's suit was dismissed on other grounds.

ordinarily will not enjoin a criminal prosecution stated (page 455):

> "This rule has no application, however, where, as in the instant case, the equity proceeding is instituted by a person who is not a party to the criminal proceeding but who nevertheless has property rights which will be irreparably injured by the prosecuting activities of the District Attorney. In such a situation equity has jurisdiction because the plaintiff has no adequate and complete remedy at law. Indeed, he has no other remedy at all."

In the instant case, plaintiff is simply a landlord of the store at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania. It does not engage in the selling of any merchandise at that location but merely leases space to concessionaires and it is these concessionaires who do the actual selling at retail for profit and, therefore, it is these concessionaires and not plaintiff who are subject to prosecution under the New Sunday Blue Law.

It is therefore clear that the case before us is governed by the decisions of the Supreme Court in the *Kingsley* case and the case of *Adams v. New Kensington*, 357 Pa. 557, 560-561, in which Mr. Justice (later Chief Justice) Stern, speaking for an unanimous Court stated:

> "But equity does have jurisdiction to enjoin such a prosecution where it is alleged not only that the statute or ordinance is unconstitutional and void but that its enforcement would cause the plaintiff irreparable loss to his property, either by effecting, if not a total suppression of his business, at least a grave interference therewith, or by subjecting him to the imposition of cumulative, exorbitant and oppressive penalties pending judicial determination of the validity of the legislation. In such cases, the ground of equitable jurisdiction is the protection of property rights, and the fact that a crim-

inal proceeding is involved is merely incidental." (Citations omitted.)

Plaintiff has alleged that a very significant percentage of the business done at its store is done on Sunday and there is no doubt that a substantial proportion of its total business involves the sale at retail of merchandise which the Act forbids to be sold on Sunday. The plaintiff has also alleged, and we find as a fact, that if the Act of 1959 is enforced at its store, it would be forced to close on Sunday and further, that a shut down on Sunday would force it to close the store completely and cease its operations, since its Sunday operations provide its margin of profit. Therefore, if this Act is enforced against the plaintiff an irreparable injury will result. Because of this and because we believe a serious challenge to the constitutionality of the New Sunday Blue Law has been presented, this Court of Equity has jurisdiction.

Nor do we think this case is governed by the recent decision of the Pennsylvania Supreme Court in the case of *Rubin v. Bailey*, 398 Pa. 271 (1960). In that case the only issue before the Court was whether or not the Chancellor had abused his discretion in dissolving a preliminary injunction. The Court did not have before it the question of whether the Chancellor could properly exercise the equitable jurisdiction of the Court nor did it decide that question. The Court merely held that the Chancellor did not abuse his discretion in dissolving the preliminary injunction which had previously been entered. In view of that narrow holding we are free to exercise our jurisdiction and decide the substantive issues raised in this matter.

We are not unmindful of the fact that Judge Raymond Pace Alexander has held the New Sunday Blue Law to be unconstitutional in the cases of *Commonwealth v. Cavalerro* and *Commonwealth v. Levenston*, Court of Quarter Sessions of Philadelphia County, Miscellaneous Division, filed April 20, 1960 (Reprinted in the Legal Intelligencer, April 22,

1960), which concerned the same Act here in question. However, we must point out that those were criminal cases in which the Court reversed summary convictions before a Magistrate and ordered that judgments of acquittal be entered. The Court in those cases did not have power to grant injunctive relief which the plaintiff here seeks, and the decisions of the Court do not prevent possible future arrests at plaintiff's store.

We are also aware that the United States Supreme Court has allowed appeals in several cases attacking the validity of Sunday Blue Laws of various states, including the New Sunday Blue Law Act of Pennsylvania, which is presently before us. However, a Court of Equity should not and must not deny a plaintiff the injunctive relief it seeks simply because another, albeit higher, Court has announced that it will hear and decide another case involving the constitutionality of the same law at some future time. Moreover, it is entirely conceivable that the opinion of the United States Supreme Court will not be dispositive of all of the issues raised herein since the present plaintiff has challenged the Act of August 10, 1959, as being violative not only of the United States Constitution but of the Pennsylvania Constitution as well.

Therefore, we will entertain jurisdiction in this matter and consider the substantive issues raised.

We must point out that the principle constitutional question before us is the challenge to the Act of 1959. This is so for two reasons. Although the plaintiff's complaint alludes to prior Sunday Blue Laws, it avers that the defendants have made arrests and are threatening to make further arrests by virtue of the Act of August 10, 1959. There is no complaint that defendants are enforcing or attempting to enforce any prior law prohibiting commercial activity on Sunday.

Moreover, equity should assume jurisdiction only in a situation where the plaintiff is threatened with irreparable

injury. There is testimony in the record of this case that the prior Act of 1939 was rarely, if ever, enforced in Philadelphia. Moreover, that Act differs from the one under consideration in that it provides for a fine of only four dollars, and it is well settled that no matter how many acts of worldly employment or business may be committed on the same day, they all constitute but a single offense for which but a single fine can be imposed. See *Friedeborn v. Commonwealth*, 113 Pa. 242. In addition, unless the violation of the 1939 Act amounts to a nuisance, it will not be enjoined. *Commonwealth v. Smith*, 266 Pa. 511. Therefore, the plaintiff can hardly complain that it would be irreparably injured if the defendants are not enjoined from enforcing the prior Act.

The defendants maintain that even if equity assumes jurisdiction in this matter, we are foreclosed from deciding that The New Sunday Blue Law is unconstitutional because of the Supreme Court's decision in the case of *Friedman v. New York*, 341 U. S. 907 (1951). In that case, involving an Act similar to the one here in question, the Court dismissed the appeal on the ground that the case did not raise "a substantial federal question." While it may be that such an action constitutes a vote on the merits of a case (see *Eaton v. Price*, 360 U. S. 246 (1959), the fact remains that the United States Supreme Court has now agreed to hear an appeal in the case of *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), which is a case involving an attack upon the constitutionality of the Act here in question.

Moreover, a sufficient answer to this contention is that Judge Magruder in the case of *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), held that the *Friedman* case was not controlling on issues similar to those now under consideration. In addition, of course, the *Friedman* case would in no way be controlling on the issue of whether the New Sunday Blue Law violates any provision of the Constitution of the Commonwealth of Pennsylvania.

Since as early as 1794 Sunday Blue Law statutes have been enforced in this Commonwealth. However, it is to be remembered that these laws were initially enacted in a setting far different from that which prevails today. The status of Pennsylvania at that time was primarily that of an agrarian society with little commercial and practically no industrial activity as we know these terms today. In addition, there was a general acquiescence in the observance of Sunday as a day of religious worship. The intervening years have brought about many changes and the Commonwealth of Pennsylvania is today a highly industrialized and commercial center of activity. Accordingly, the Legislature has taken cognizance of these changes on a number of occasions and has enacted various laws which create exceptions to the general prohibition of engaging in worldly activity on Sunday.[2]

The defendants contend that the New Sunday Blue Law is not religious in nature but rather is a "day of rest"

2. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 p.m. on Sunday if the voters of the municipality so vote by referendum (Act of July 2, 1935, P. L. 599, 4 P. S. 59-65); to play professional baseball and football after 2:00 p.m. on Sunday, if the voters of the municipality so vote by referendum (Act of April 25, 1933, P. L. 74, 4 P. S. 81-87); to stage musical concerts after 12:00 noon on Sunday, when authorized to do so by Commonwealth's Department of Public Instruction, and to compensate musicians participating in such concerts (Act of June 2, 1933, P. L. 1423, No. 308, 4 P. S. 121-127); to play polo after 1:00 p.m. and before 7:00 p.m. on Sunday unless the voters of the municipality have voted to the contrary by referendum (Act of June 22, 1935, P. L. 446, 4 P. S. 151-157); to play tennis after 1:00 p.m. and before 7:00 p.m. on Sunday (Act of June 22, 1935, P. L. 449, 4 P. S. 181-185) provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday (Act of April 14, 1937, P. L. 312, sec. 1, as amended, 30 P. S. 265); to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday (Act of June 3, 1937, P. L. 1225, Art. VII, sec. 702, as amended, 34 P. S. 1311.702); and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday (Act of April 12, 1951, P. L. 90, Art. IV, sec. 406, as amended, 47 P. S. 4-406).

statute which the Legislature may provide for under the Commonwealth's police power. It is clear that in order to be valid on this basis the Act of August 10, 1959, must constitute a *proper* exercise of the police power which is inherent in the Legislature of a sovereign state. The basis of the exercise of the police power and the limitations thereof were defined by Mr. Justice (now Chief Justice) Jones in *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 47-48 (1948) as follows:

> "In any circumstances, an exercise of such power, if it is to be valid constitutionally, must bear a reasonable relation to a lawful end sought to be attained thereby. In short, the police power can never be exerted legally except it be exercised in the public interest. Consequently, unless a given exercise of the power promotes or tends to promote the public safety, health, morals or welfare, it is without constitutional sanction. For a legitimate exertion of the police power there must be 'a reasonable and substantial relation between the thing acted on and the end to be attained, one that promotes health, safety or general welfare, necessary to the common good, and a reasonable demand for regulation, not one that is merely an unnecessary "experimentation (or interference) with the fundamental rights of the individual": *Truax v. Corrigan*, 257 U. S. 312, 338'."

It is well settled that no Legislature may exercise the police power under the guise of protecting the public interest and thereby arbitrarily interfere with private business by imposing unreasonable and unnecessary restrictions upon lawful occupations. In *Commonwealth v. Zasloff*, 338 Pa. 457 (1940), former Chief Justice Stern said, at page 460:

> ". . . in these, as in all cases, the police power is not unrestricted; its exercise, like that of other governmental powers, is subject to constitutional limitations and judicial review, otherwise we would have an ab-

solute instead of a constitutional scheme of government. It has frequently been stated by federal and state courts alike that a law which purports to be an exercise of the police power must not be arbitrary, unreasonable or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained: (citations omitted). The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations: (citations omitted). While it is for the legislative branch of government to enact such measures as it deems desirable for the advancement of the public welfare, the judiciary is the ultimate authority to determine whether constitutional restraints have been violated, confining itself, of course, to the question, not of legislative policy, but of legislative power: (citations omitted) . . . ".

It seems clear that the statute in question is arbitrary and unreasonable on its face. The Act does not prohibit all commercial activity on Sunday but prohibits only sales *at retail*. Therefore, the Act in question permits a man to engage in the manufacture of clothing on Sunday but prohibits a man from selling that same article of clothing on Sunday. It permits a sale of furniture at wholesale on Sunday but prohibits a sale on Sunday of the same article of furniture at retail. We can see no valid reason or justification for the Legislature to draw a distinction between a retail sale and any other type of commercial activity. If the Act is designed to provide a day of rest for the citizens of this Commonwealth (even assuming that the Legislature could impose restrictions upon commercial activity on one particular day) it would certainly seem that employees of wholesale establishments, factories and service establishments need their rest as much as do employees of retail stores.

Moreover, an act which permits the Sunday sale of articles at wholesale but prohibits the Sunday sale of articles at retail violates the constitutional requirement that "a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found." *Morey v. Doud*, 354 U. S. 457, 465 (1957); *Smith v. Cahoon*, 283 U. S. 553, 567 (1939).

The Supreme Court of the United States has held in the case of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 406 (1928) that:

> ". . . classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

In addition, the New Sunday Blue Law does not prohibit the retail selling on Sundays of all goods and commodities but only prohibits the retail selling of certain enumerated articles and commodities and for this reason, also, it is arbitrary and discriminatory. For example, one is prevented by the Act from selling a customer a toy for his child but not candy for his wife. The Act prohibits the selling of a rake, but not grass seed. The Act does not prohibit the sale on Sunday of a house which may contain all sorts of kitchen equipment but does prohibit the retail sale of a ten cent can opener to be used in the kitchen. We could multiply these illustrations a hundredfold to point out the incongruity of the Act in this respect. We are at a loss to understand how these distinctions can be justified on the basis of a valid exercise of police power.

In our opinion the New Sunday Blue Law is clearly not an exercise of valid police power but by virtue of its arbitrary and unreasonable classifications violates those sections of the Pennsylvania Constitution which prohibits the Legislature from passing any local or special law regulating labor, trade, mining or manufacturing (Article III, sec. 7), and which guarantee all men the right of acquiring, possessing and protecting property (Article I, sec. 1).

In addition, it is our opinion that the New Sunday Blue Law also violates the Constitution of the United States in that it constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment. It denies to plaintiff the equal protection of the law guaranteed by that amendment. See *Crown Kosher Super Market v. Gallagher, supra,* in which the Court stated:

> ". . . the objection is well taken that in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment." (Citations omitted.)

We next turn our attention to the serious question of whether the Act of August 10, 1959, violates Article I, section 3, of the Pennsylvania Constitution which provides:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and *no prefer-*

ence shall be given by law to any religious establishment or modes of worship." (Emphasis added.)

and the First Amendment of the Constitution of the United States which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .",

and which is applicable to Pennsylvania by virtue of the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

While the statute under consideration does not specifically mention religious observance and religious beliefs, the effect of the statute clearly discriminates against certain religious groups in that it commands all citizens of the Commonwealth of Pennsylvania to abstain from certain commercial retail activity on Sunday, irrespective of their individual religious beliefs which may require religious observance of a different day. (See Finding of Fact No. 10).

If the Legislature desired to set aside one day of the week as a uniform day of rest, it would certainly seem that no exceptions to the general prohibition against commercial activity would have been permitted. In addition, the Commonwealth of Pennsylvania has already enacted a pattern of economic laws under the police power regulating hours of work, which operate independently of the Sunday Laws. They include such statutes as Act of July 25, 1913, P. L. 1924, sec. 3, as amended, 43 P. S. 103(a), (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, sec. 4, as amended, 43 P. S. 46 (persons under the age of eighteen cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, sec. 1, 43 P. S. 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, sec. 1, 43 P. S. 481 (employees of motion picture theatres must be given one day of rest per week).

Finally, in this connection we come to the point previously referred to in this opinion namely, if this Act is simply a "day of rest" statute and not a "religious" statute, on what reasonable or rational grounds can the "crazy-quilt" pattern of prohibiting only retail selling in general and only retail selling of certain items in particular be justified? Surely, those who are engaged in commercial activity other than retail selling need their day of rest as well as the clerks who sell at retail the items enumerated in the Act of 1959. It is thus clear that the Act is not a day of rest statute but is religious in origin and nature.

Regardless of the basis used for sustaining the validity of prior Sunday Blue Laws it is now clear that the standard by which any Sunday Blue Law must be judged is set forth in *McCollum v. Board of Education*, 333 U. S. 203, 210-11 (1948), where the Court said:

> "Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church or attendance or nonattendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'"

The doctrine of the separation of Church and State embodied in the First Amendment of the United States Constitution and the comparable section of the Pennsylvania Constitution require us to hold the Act of August 10, 1959, void and unconstitutional on this ground also.

There is one further aspect of this matter that we deem it necessary to consider. The record supports the plaintiff's assertion that it is the established policy of the Police

Commissioner to enforce the Act of 1959 only against employees of certain large retail establishments such as discount houses and farmers' markets. This has been accomplished by sending members of the police department in plain clothes to the large retail establishments where they make purchases of items prohibited by the Act to be sold at retail on Sunday. As a result of these purchases arrests are then made.

The Police Commissioner explained that the reason for this discrimination in enforcement is due to the Police Department's lack of sufficient funds and manpower to enforce the Act fully and adequately as to every retail establishment in the city. Thus, we have the undesirable situation in Philadelphia of a law being enforced only against a few retail establishments while many other such places of business continue their Sunday activities in complete disregard of the law.

Of course, the fact that a particular law may not be enforced uniformly does not, of itself, raise any constitutional question. If one is arrested because of criminal activity he cannot complain that the law is unconstitutional simply because someone else who has violated the same law has not been arrested. But, in the instant case, an additional and extremely important factor is present. The admitted discrimination in enforcement is a calculated result of a definite policy on the part of a public official and thus results in a denial to the plaintiff of the equal protection of the law to which it is entitled by virtue of the Fourteenth Amendment of the United States Constitution.

The leading case in this area is that of *Yick Wo v. Hopkins*, 118 U. S. 356. The opinion in that case was delivered by Mr. Justice Matthews speaking for the unanimous Supreme Court of the United States and we consider his language extremely apposite to the case at bar:

> "In the present case we are not obliged to reason from the probable to the actual, and pass upon the

validity of the ordinances complained of, as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

A more succinct statement of the same principle appears in the case of *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352, in which Justice McReynolds stated:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

It is clear that the New Sunday Blue Law places a difficult burden on the Police Department of the City of Philadelphia, and to enforce it against all retail merchants

would necessitate the transfer of large numbers of police personnel from other important duties. The fact remains, however, that the present policy of selective enforcement is unconstitutional discrimination.

Therefore, for all of the reasons set forth in this adjudication, we are constrained to hold that the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10, is unconstitutional and, therefore, void.

The Chancellor makes the following

CONCLUSIONS OF LAW.

1. The Act of August 10, 1959, is unconstitutional in that it is violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

2. The Act of August 10 1959, is unconstitutional in that it is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

3. The Act of August 10, 1959, is unconstitutional in that it is violative of the First Amendment of the United States Constitution as applied to Pennsylvania by the Fourteenth Amendment of the United States Constitution.

4. The Act of August 10, 1959, is unconstitutional in that it is violative of Article I section 1, of the Pennsylvania Constitution.

5. The Act of August 10, 1959, is unconstitutional in that it is violative of Article I, section 3, of the Pennsylvania Constitution.

6. The Act of August 10, 1959, is unconstitutional in that it is violative of Article III, section 7, of the Pennsylvania Constitution.

In accordance with the foregoing we enter the following

DECREE NISI.

AND Now, to wit, this 10th day of June, 1960, it is

ORDERED, ADJUDGED AND DECREED.

1. That the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10, is unconstitutional and, therefore, void.

2. That defendants and their agents are permanently restrained and enjoined from arresting or threatening to arrest any of the employees of the plaintiff corporation or of plaintiff's concessionaires at plaintiff's store located at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania, for violation of the Act of August 10, 1959.

3. That the costs of these proceedings shall be paid by the defendants.

The Prothonotary is directed to enter this Decree Nisi, and to give notice thereof to the parties or their counsel of record, and unless exceptions are filed within 20 days thereafter, this Decree Nisi shall become the Final Decree, as of course.

By THE COURT:

ETHAN ALLEN DOTY,
J.